Legitimacy
an essentially contested concept

Ioannidis, Christoforos

Awarding institution:
King's College London

Legitimacy: An Essentially Contested Concept

Christoforos Ioannidis

Doctor of Philosophy

2019

King's College London

Abstract

This thesis will perform a conceptual analysis of legitimacy and conclude that legitimacy is an essentially contested concept. While most literature pertaining to legitimacy assumes specific conceptions of legitimacy, this discussion performs a conceptual analysis of normative (as opposed to descriptive) legitimacy. I will investigate what ~~is~~ the content of legitimacy as a concept detached from its individual conceptions is, explore the nature of this concept (substantive or procedural?; claim right, liberty or moral power?), illustrate its relationship with neighbouring concepts such as authority, and conclude that it is an essentially contested concept, i.e. that there can be equally reasonable, evidenced and well-argued conceptions of this concept, without an independent argument solving the dispute between the competing conceptions.

To properly understand the concept of legitimacy, it must be conceptualised under a trichotomy. At the top tier of the pyramid (Tier 1) lies legitimacy in its most abstract from (legitimacy in abstracto), which is a vague standard of properness. At the next level of the pyramid (Tier 2), legitimacy becomes more specific and relevant to legal material,) because here it is attached to the four object types of legal form (what can be legitimate or illegitimate?), namely individual law, action, actor, and legal order. Analysis of the concept of legitimacy at Tier 2~~,~~ concludes the truth value of the claims that normative legitimacy is incompatible with nihilism, that, following Applbaum, although it is conceptually possible to understand normative legitimacy as entirely procedural, it is best understood as at least partly substantive and, again relying on Applbaum, that legitimacy is neither a claim right nor liberty right as so far understood in the literature, but moral power. With the appropriate framework for the discussion of legitimacy, this thesis will analyse the connection of the concept of legitimacy with neighbouring concepts, especially authority, and also with conceptions. Then, the thesis will illustrate what essentially contested concepts are and proceed to its main claim, i.e. that legitimacy is an essentially contested concept. Finally, the thesis will proceed to Tier 3, the level of normative conceptions, and analyse an important conception of legitimacy of international law, namely justice in the sense of protecting human rights, as this analysis will help manifest the nature of legitimacy as an essentially contested concept.

Table of Contents

Acknowledgements

First and foremost, I would like to thank a brilliant teacher and an amazing human being, Mrs Eleni Demetriou, now deceased, a truly unique high school teacher with whom I developed, both as a thinker and as a human being, and with whom I first connected to my passion for philosophy and the fundamental questions of the human condition. Fate had it that she left us too early; the memory of her never will. Next, I would like to thank my parents for their unconditional love and support. Last but not least, I would like to thank my supervisor, Dr Christoph Kletzer, for the guidance, encouragement and advice he has provided throughout my time as his student, and for his reflections and comments which immensely helped me mainstream the thesis.

CHAPTER 1
Introduction

1.1. Research Context

As history unfolds, certain truisms of human nature become evident. Like all animals our nature is deeply, though not fully, determined by some major instincts: our instinct to feed and survive, the sexual instinct to reproduce, and, as Aristotle identified, our need to live in the company of other fellow human beings. Indeed, unlike solitary animals that spend the majority of their lives alone apart from when needing to mate, human beings live in the company of other fellow beings. Formation of societies and consequent need of social order for the survival of the species is intrinsic to human nature. The need for maintaining social order is satisfied by regulation of external behaviour of the members of the society. Traditionally, habitual norms, custom and law have developed, as a matter of social convention, to satisfy this need. Indeed, certain primitive societies aside where habitual norms and custom may have played the role of regulating social behaviour to avoid chaos, this social order has been maintained by a legal order.

As complex human beings, however, aside from the aforementioned human instincts, we have other intuitions that may occasionally create tensions with the need to live in organised societies. A distinct element of the human condition contrast to other animals is indeed our inherent tendency for moral reflection and deliberation. ‘Good’ and ‘bad’ are not only concepts that have developed for evolutionary reasons of survival (wild beast – bad, food – good), but at least from the formation of societies, they have obtained a moral touch. From a purely sociological/descriptive standpoint, human beings have formed moral beliefs (regardless of whether the beliefs are true or false in terms of objective morality) even before the rise of great civilisations of antiquity, from the formation of primitive societies. Even the few supporters of moral nihilism (the view that there are no moral facts; a view that will be explained in this discussion) recognize that human beings have always had moral intuitions and reflections, regardless how flawed. Moral evaluation of individual laws and the entire legal order

which maintains social order and regulates our external behaviour is thus an inevitable human tendency intrinsic to our very nature.

There is also a practical utility in moral reflection in general and moral evaluation of law in particular. The former helps us become, not necessarily always better human beings, but at least more consistent in our moral beliefs – this is how moral philosophy helps us improve as human beings, at least to the extent to which we call ourselves rational. The latter, moral evaluation of law in particular, is not only a manifestation of our natural instinct and tendency for moral reflection, but also a practical need to improve the way with which we restrict our freedom in order to regulate behaviour and maintain social order necessary for our survival: law.

Hence, the sharp contrast between legal validity and legitimacy. The Kosovo Report, which, as we will see, drew a sharp contrast between legality and legitimacy of an action (attack against a sovereign state), did not construct this distinction between legality and legitimacy out of a legal argument, or by stretching the limits of legal imagination. The distinction between legality/legal validity and legitimacy is inherent in our interaction with the law as such. On the one hand, legal order is by definition a legally valid order; on the other hand, since a legally valid order is one that is by large effective, which is a descriptive, not normative fact, legality does not necessarily (nor contingently for that matter) entail legitimacy. Indeed, a legal order may be illegitimate under any standards of legitimacy – one need not only think of the past, such as Hitler's Germany with the holocaust, Stalin's Soviet Union having killed more people than Hitler, Mao's China – regime that exterminated even more, but also current regimes, such as North Korea. Legitimacy is *still* an issue.

So far, we have identified legitimacy with morality; if so, is there any difference? If Austin's classic quote in philosophy of language 'no modification without aberration' stands true, we are not unjustified in being predisposed to find a difference between legitimacy and morality. If these two words meant exactly the same, they would not have both survived. The chances are, as is indeed the case, that they are different. Morality is set of principles about what is right and wrong and what is good in general. Its object (what can be moral?) are human beings, and human actions and decisions, such as law. Legitimacy, in contrast, is a vague notion of properness. As such, it can be

connected with several object types. A legal order can be legitimate, and an argument can be legitimate, whereas we can also use the concept of legitimacy in family contexts like family relation, like in calling someone a 'legitimate daughter'. Legitimacy of law in particular, as we shall also see, has a limited number of object types. Although legitimacy of law is best understood, as it is often understood, in a moral sense, there is, conceptually speaking, as we shall see in Chapter 2, room for a merely procedural conception of legitimacy. This thought has already revealed one of the most important tenets of this discussion: that the concept of legitimacy lends itself to more than one conception.

This does not mean, however, that there can only be two conceptions, namely moral/substantive and procedural. As we will see in this discussion, the concept of legitimacy is open ended, in the sense that what projects content in the concept of legitimacy is the specific conception in question, not the concept of legitimacy itself detached from any conceptions. If it is the case that different conceptions of a concept are advanced, and it can be objectively determined that one of them correct, then the concept is *contested* between several conceptions. If it is the case that there are several conceptions of a concept, all of them are supported by evidence and are well argued, and there is no independent argument to resolve the dispute between competing conceptions, then the concept is *essentially contested*. In order to reach this important claim about legitimacy though, we must go through conceptual analysis of legitimacy, which will lead us through a trichotomy, or three tier pyramid, with the most abstract sense of legitimacy at the top, and the normative conceptions at the bottom.

In this discussion, I claim that legitimacy as a concept, i.e. without a specific conception being assumed or implied, properly be understood in a trichotomy, is an essentially contested concept.

1.2. Significance of the Discussion

Before outlining the argument, one important question needs to be answered: why is it important to properly conceptualise legitimacy, understand what kind of right it is and whether legitimacy is an essentially contested concept? One could even ask a logically

prior question, namely why is legitimacy of law important at all? After all, law is what it is, legitimate or not.

A reason why legitimacy is important lies in what has already been mentioned but it needs to become more explicit. Legitimacy of law, especially to the extent that it pertains to morality, helps improve law. The observation that the Nazi regime, Stalin's Soviet Union, Mao's China, the 18th century US legal order providing for slavery, North Korea, etc. are examples of illegitimate legal orders, makes it clear that such legal orders ought to be avoided. This observation supports the importance of the *moral* evaluation of law, which is the conception of legitimacy in this instance; we are yet to identify a reason why legitimacy *per se* is important to discuss.

Indeed, from Plato until recently, legitimacy in a legally relevant context has been discussed particularly in the context of political legitimacy, i.e. justification of coercion in domestic legal orders. In other words, the question of legitimacy is traditionally understood to be the following: what justifies the government to use coercion and restrict individual liberty? Justification is extremely important as it identifies normative relations of the individuals with the government. Just because an authority exercises power as a matter of fact, that does not necessarily entail that it is justified in doing so. One can draw a parallelism with factual 'being obliged' and legal 'being obligated'. Being asked by a gunman under the use/threat of force to hand in your property is being *obliged*, as per Hart's famous example, contrast to being *obligated* to pay taxes by law. Similarly, an authority lacking justification, in other words an authority which exercises power as a matter of fact but is illegitimate, or de facto authority, is an authority that is seen very differently, in normative terms, by its subjects, compared to legitimate authorities. Indeed, unless I am brainwashed by the regime of North Korea, I identify very different reasons of action towards that authority, compared to when I am in the UK. Aristotle, Hobbes. Locke, Rousseau etc. have addressed such questions.

A manifestation of the importance of conceptual analysis of legitimacy thus becomes obvious. If the addressee of law is to understand that being obliged means he is forced to do something whereas obligated means he has a moral or legal obligation regardless of whether he will actually be forced, how is he to understand a legitimate law? Does it mean that he has a moral obligation obey the law? This is the case if legitimacy is a

claim right. If legitimacy is a liberty right, then even though there are good reasons for the law to have been established, the addressee of legitimacy does not necessarily have a moral obligation – no obligation would exist as corollary to legitimacy. What if legitimacy is neither a claim right nor liberty right, but a second order right, namely a moral power? How would his normative relationship vis a vis the law be changed? In order for the addressee of law to understand his normative status vis a vis the law then, he is required to have understood the nature of legitimacy, which stems only after a conceptual analysis, detached from normative conceptions.

At this point in time, it is safe to say that the predominant conception of legitimacy in domestic legal orders (not in international law) is liberal democracy. Legitimacy is even used as shorthand for 'democratic legitimacy'. Not only the times of kings has long ended and royalty is nowadays restricted in a symbolic role, but any defeats of democracy, such as coups, totalitarian regimes or radical religious regimes such as the Taliban, are regarded as defeats of humanity and problems which need to be addressed. The question that arises in such cases is not what justifies the coup or totalitarian regime in question, but how we ought to assist the democratisation of the regime.

The prevalence of the democratic conception of legitimacy has had an unintended negative side effect. It has created the false impression, perhaps even the erroneous assumption, that there can be no other conceptions of legitimacy, or it has made us not wonder what conception of legitimacy is being deployed in each instance in which the concept of legitimacy is being used. The legitimacy discussion is often structured in a way that prevents us from asking exactly what it is we are supposed to be asking: we often ask whether an object of legitimacy is legitimate, without asking the logically prior question, i.e. which conception of legitimacy is assumed.

The question would not arise if legitimacy was in full overlap with morality, i.e. identical with moral evaluation of law. But we have already seen that the political legitimacy discussion has brought democracy as the prevalent conception. Democracy and morality are two different conceptions of legitimacy. Based on the discussion so far, this is easy to discern.

What is also important to note, is that they may also refer to different objects of legitimacy. Democracy is often (though not exclusively) used as the standard of legitimacy of legal orders, whereas morality is often used for a variety of objects. If the United Nations Security Council (UNSC), an international body, is legitimate because it significantly contributes to peace and stability and helps prevent wars protecting human lives across the planet, the conception of legitimacy is morality, not democracy, since only a handful of the member states of the UN are members of the UNSC.

In order to make sense of legitimacy, one must approach legitimacy in terms of conceptions and object of legitimacy. What exactly is being asked here, whether the UNSC itself is legitimate, or whether one specific action of the UNSC, such as a resolution authorising an attack, is legitimate? It could be the case, that a legitimate entity occasionally issues illegitimate decisions. What is, the next question follows, the standard/conception of legitimacy in each instance – of the UNSC and of a specific action?

The last question, i.e. what conception of the concept of legitimacy is being used, already assumes the possibility of there being more than one conception of legitimacy of the same object (such as the UNSC). If there are indeed different conceptions of legitimacy (for the same object), then legitimacy is a contested concept. If more than one conceptions are well evidenced, well argued and there is no independent argument solving the dispute between the competing conceptions, then legitimacy is an essentially contested concept. If legitimacy is an essentially contested concept, then even after identifying the conception of legitimacy used as correct and appropriate, we do not necessarily (though that depends on the context and the object of legitimacy; there are instances where only one conception of legitimacy stands) exclude all other possible conceptions as inappropriate.

Not answering the question of essential contestability of legitimacy leads to confusions and miscommunications in the legitimacy discussion. We may think we agree, yet we disagree. Suppose the following two sets of claims as examples. The first claim is that the US/UK attack on Kosovo was legitimate and the conception of legitimacy assumed is that it stopped Milosevic from exterminating more innocent civilians (protection of human life). The second claim is that the US/UK attack on Kosovo was legitimate

because although the NATO bombings exterminated more innocent civilians than Milosevic, it applied the western plans for the area. One can regard a referendum as illegitimate because it divides a country at crucial moments when unity is essential, whereas another may regard the same referendum as illegitimate because the stipulation of the question was misleading. Hiding the contrasting conceptions under the word 'legitimacy' gives the illusion of agreement, whereas the substantial disagreement remains hidden and the discussion may continue on false premises.

By answering the question of essential contestability of legitimacy, we frame the discussion of legitimacy properly. It becomes clear that there are, or at least can be, depending on the case, different conceptions of legitimacy, so the first response/clarification to statements or questions of legitimacy should be what the standard/conception is, unless of course that is obvious. Then, we ask whether all the different conceptions are well argued and well evidenced and whether there is an independent argument solving the dispute between competing conceptions, in order to determine if, in the given instance, legitimacy is an essentially contested concept. If not, then we have good reason to attempt to determine which is the correct or best conception of legitimacy of the given object of legitimacy. By contrast, if in the given instance legitimacy is an essentially contested concept, then we understand that the object of legitimacy can be evaluated by different standards and that will essentially change the discussion form one of legitimacy, to whatever the conceptions are. 'Legitimacy' will no longer be the correct rhetoric to use as it will be causing more confusion than clarity, hiding essential disagreements and conflating essentially different evaluations of, and thus different discussions on, the same object.

Furthermore, there is the question of the nature of the concept. If legitimacy is not an essentially contested concept, then we know we ought to attempt to identify the correct conception in each instance. We know that legitimacy is a concept which always has a fixed content, depending on which conception is correct. We know that we do not have to be too tolerant towards competing conceptions but be predisposed to reject other conceptions once it has been proven that one conception is correct. If, however, legitimacy is an *essentially* contested concept, we are more inclined to exercise caution when examining different conceptions of legitimacy, even after one has been proven to be correct. This is because essential contestability implies the possibility of more than

one correction being correct. To understand legitimacy, we need to understand whether it is an essentially contested concept.

Let's put this in context. Democracy is indeed a well-evidenced and well-argued conception of political legitimacy. If legitimacy is not an essentially contested concept, then the quest for the standard of political legitimacy has ended. It is a dead issue. We ought not seek for any other standard, as we have found the one. If other conceptions do arise, assuming the concept is contested but not essentially contested, we are predisposed to assume one conception is correct and the other is wrong with all this entails. It is only when understanding that legitimacy could, though not in every instance, be an essentially contested concept, that we understand that it is not strange if there are more than equally well-argued and evidenced conceptions.

It becomes clear then that legitimacy receives its content from conceptions. If so, how come there is a concept of legitimacy at the first place? If advanced conceptions are conceptions of the one concept of legitimacy, what is the content of the concept that these conceptions specify? If there is a concept of legitimacy, it has to have a minimum content detached from any conceptions, that is specified by conceptions. If legitimacy is not an essentially contested concept but it has predetermined conceptions, then it cannot have any fixed meaning or content detached by its conceptions, so legitimacy per se is meaningless, it is a non-concept. As stated above, this minimum content of legitimacy detached from its conceptions is a vague standard of properness.

The essential contestability of legitimacy, if so, may be able to account for legitimacy as a unified concept within and also outside law. If legitimacy is not an essentially contested concept and its content is predetermined by given conceptions, then legitimacy when used in law is bound to have an entirely different meaning than in instances like 'legitimate argument' and 'legitimate daughter' which we shall soon discuss. However, if legitimacy is an essentially contested concept, then it may have a minimal content (vague properness), which becomes more concrete in context. As we shall see, this scheme leads to the *trichotomy* of legitimacy, which is the *fundamental* premise of the argument.

1.3. Thesis and Thesis Structure

Indeed, the argument begins with the trichotomy of legitimacy. In the next chapter, I will give examples of the concept of legitimacy used in different contexts, with law being merely one of those contexts. Amidst different contexts, in order to identify one concept of legitimacy, it will be necessary to climb high on the ladder of abstraction, to what I call Tier1: legitimacy in abstracto. Indeed, in its most abstract form, legitimacy is a vague standard of properness. At this high level of abstraction, legitimacy as a concept is not specified by any conceptions and it is not matched with any object of legitimacy. Tier 1 consists merely of the concept of legitimacy detached from any conceptions. Then, we will climb one step down in the ladder of abstraction, Tier 2, thus matching the concept with specific objects – what can be legitimate? Given the topic of the discussion obviously pertaining to law, we will not be referring to legitimate arguments or legitimate children, which are instances of legitimacy of the same tier but with different objects, but we will refer to legitimacy of the four object types of legal form, namely individual law, action, actor, and legal order. This is where the gist of conceptual analysis takes place. In Tier 2, the discussion must proceed to certain distinctions, which are necessary for legitimacy to be properly understood, before proceeding to individual conceptions of legitimacy (Tier 3) which give concrete meaning to legitimacy. I will illustrate this by the conventional distinction between normative and descriptive (or sociological or perceived) legitimacy and clarify that this discussion pertains to normative legitimacy. I will then try to refute nihilism and explain how such a refutation is necessary for understanding normative legitimacy and then claim that although there is conceptually room for understanding legitimacy as entirely procedural, it is best understood as at least partly substantive. Following Applbaum, I will end Chapter 2 by rejecting two views well established in the literature, namely that legitimacy is a claim right on the one hand and a liberty right on the other. I will conclude that legitimacy is a second order right, namely moral power. This claim, although already made by Applbaum, is extremely important for conceptual analysis and thus this discussion in overall, as it determines the nature of the concept in terms of the normative status of the addressee.

In Chapter 3, I will discuss the relation of the concept of legitimacy with neighbouring concepts on the one hand, and with conceptions of legitimacy on the other. As regards

the former, I will first explain how it is that, assuming legal positivism, so called 'legal legitimacy' is essentially a non-concept ('legal legitimacy' refers to a specific understanding, rather say misunderstanding, of legitimacy; it is irrelevant to what I referred to above as 'legitimacy of law' which means legitimacy in the context of law, such as legitimacy of a legal order, legitimacy of a government, legitimacy of an individual law, which was meant to exclude uses of legitimacy irrelevant to law such as 'legitimate daughter' and 'legitimate argument'). Then, I will analyse the neighbouring concept of legitimacy, namely authority, and explain the relationship between the two. At the second part of this chapter, I will discuss the relation of legitimacy with conceptions of legitimacy. Relying on Gallie, I will start by explaining what essentially contested concepts are. I will then briefly explore how the concept vs conception distinction was discussed by Hart, Rawls and Dworkin. Finally, I will illustrate how it is that legitimacy is an essentially contested concept, which is the thesis, the claim of the argument, and the main contribution of this discussion to knowledge.

In Chapter 4, I will enter Tier 3, the level of conceptions of legitimacy, discussing legitimacy of international law in particular. Just like Tier 2 could be legitimacy matched with any object, such as an argument, as in 'legitimate argument', Tier 3 could consist on any conception of an object of legitimacy. As mentioned above, legitimacy has traditionally been heavily discussed in terms of political legitimacy; also, in political legitimacy, the conception of democracy dominates, thus making it hard to see legitimacy as an essentially contested concept. By contrast, legitimacy in international law has been discussed relevantly only recently, especially after the US/UK attack on Kosovo. I analyse Buchanan's conception of legitimacy of international law, namely justice in the sense of protecting human rights, because this conception of legitimacy, as I explain, renders legitimacy as an essentially contested concept. Towards the end of the chapter, I briefly discuss two other, yet related conceptions of legitimacy of international law, namely Buchanan's later view on legitimacy, namely the Metacoordination view, and end with Ratner's twin-pillar conception consisting of advancing peace and respecting, in the sense of not violating, basic human rights.

Unlike political legitimacy, legitimacy of international law helps us see legitimacy as an essentially contested concept. Still, it could be argued, why is there such a need for

legitimacy of international law in particular to be discussed, that it occupies such a great extent in this discussion?

1.4. Significance of Legitimacy of International Law

The concern about legitimacy of international law rose with facts, which directly and dramatically affected the lives of many people around the globe, and in some ways, they still do. Indeed, although the obvious reason why we care about legitimacy of international law and international institutions is that we might want to know whether they are worthy of our support,[1] it is relatively recent facts, which sparked the interest in legitimacy. In particular, after the Cold War, attempts to establish the rule of law in international relations have rather failed. Some typical examples of this failure which are often cited is the inconsistent and drifting response of the international community to the dissolution of Yugoslavia, the half-hearted, abortive intervention to rebuild a shattered civil order in Somalia, the world's paralysis (or indifference) in the face of genocide in Rwanda, the absence of a genuinely global, multilateral response to global terrorism.[2] These facts prompt us to start morally theorizing international law. However, theorizing alone does not make the world a better place and theorizing international law is not *creating* international law. Therefore, the question regarding the significance of legitimacy of international law amounts to: how is moral theorizing of law important if it does not lead to better legal rules?

Some writers on legitimacy maintain that moral theorizing of international law is important because it provides "prescriptive principles that will provide substantial guidance for at least most of the important issues with which international law must deal or which it could profitably address."[3] The idea here is that the reason why international law failed to address the problems mentioned above (dissolution of Yugoslavia, Somalia, Rwanda, etc.) is not fully explained just by states which have the resources to further the rule of law not committing themselves to do so, but also by lack of *moral* principles. International law has plenty of legal principles in its armoury, but it

[1] See, e.g. Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2013), 326; 'worthy of our support' means only that and does not include moral obligation to obey.
[2] See, e.g. Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law (OUP 2003), 9.
[3] Ibid, 10.

does not have a moral guidance to apply them consistently. Examples of inconsistent application of legal principles are plentiful.

> During the Yugoslav crisis, the United States and other Western powers sometimes appealed to the hoary principle of the territorial integrity of existing states, sometimes to the stirring but vague principle of self-determination (that perennial threat to the territorial integrity of states), sometimes to the principle of *uti possidetis* (according to which boundaries are to remain fixed unless changed by mutual consent), and sometimes to the principle of democracy (which on some interpretations implies self-determination for minority groups, but on others overrides it). But so too did those massive violators of human rights, Milošović and Tudjman. Responses to the break-up of the Soviet Union revealed the same confusion about principles. Americans felt indignant when Gorbachev said it was inconsistent for them to revere Lincoln for preserving the Union and condemn him for resisting the dissolution of the Soviet Union. Yet few could explain precisely why his analogy was mistaken.[4]

Although it is admitted that the content of legal rules ultimately depends on legal practice which in turn also depends on political will, it is believed that a set of moral principles will make legal principles more consistent and coherent and thus more effective. I find this reasoning very well intended in an effort to make this world somehow better, but I also find it slightly presumptuous. There is no doubt that consistency will increase what Franck would call "pull to compliance."[5] Indeed, legal rules which are less ambiguous, more specific, more consistent, are more likely to be enforced.

However, in order for it to be true that a set of moral principles will make legal principles more consistent, there ought to actually *be* a set of moral principles. These moral principles must either be fully agreed upon, as a matter of convention, or they must *necessarily* derive from international law itself, or law as a phenomenon. There is no indication that there is such an agreement, either in the world of international relations, or in the world of international theorists. On the contrary, states and political leaders seem to widely disagree on any such moral principles. The People's Republic of

[4] Ibid.

[5] Thomas M Franck, 'Legitimacy in the International System' (1988) 82 The American Journal of International Law 705, 705; see also, 'Legitimacy and Fairness' in *Fairness in International Law and Institutions* (OUP 2011) where he explains that the degree to which a rule is *perceived* as legitimate is itself affected by certain intrinsic properties both of that rule and of the process by which it was made, and the process of its interpretation by judges and officials and he discusses four indicators of legitimacy (in a sociological sense), namely determinacy, symbolic validation, coherence, and adherence.

China tends to see international law much more about protecting state sovereignty and maintaining the status quo, as is seen both in her policy in surrounding seas and the veto in the United Nations Security Council (UNSC) regarding interventions for protecting human rights, whereas the US presumably sees international law more about protecting human rights, even if that entails violating the status quo and state sovereignty, presumably for human rights, as it claims to have done, for example, when attacking former Yugoslavia. There seems to be disagreement about such principles, if there are any, in the world of international theorists as well. Whereas some theorists would advance justice in the sense of protecting human rights as these moral principles, as opposed to peace, others would advance a two-pillar system comprising of advancing peace and respecting, in the sense of not violating, human rights, whereas one could consistently hold that peace/stability is another conception of legitimacy of international law.[6]

A great contribution of this discussion is that it identifies what is offered by such theories in the field: by arguing for such standards of legitimacy, they are advancing substantive conceptions of the concept of legitimacy. In other words, they make substantive arguments why such conceptions of legitimacy are better candidates for the concept of legitimacy. But the contribution of this discussion moves further than that. It identifies essential internal tensions within these theories on the one hand, and on the other hand it answers the question of what the relation between these conceptions of legitimacy is. Thus, this discussion illustrates two ways with which legitimacy of international law is an essentially contested concept: by the conception itself being essentially contested (e.g. justice) on the one hand, and by the absence of an argument solving the dispute between well argued conceptions (e.g. protecting human rights, peace + refraining from violating human rights). Indeed, although certain remarks on values will result from the analysis, the present discussion does not attempt to present another substantive moral argument in favour of a different/better conception/standard of legitimacy, but it analyses the concept of legitimacy per se, it asks what lies in the concept of legitimacy detached from its conceptions, and what we can and cannot logically derive from this concept without taking a stand in a substantive moral debate.

[6] All such theories will be addressed at the final part of this discussion.

For the purposes of this part of the discussion regarding the significance of legitimacy of international law as a topic worth pursuing and a question worth asking, it suffices to say that it is presumptuous to assume that just because there is a need of moral theorizing of international law, there necessarily are such moral principles to start with, which are perfectly consistent with each other in the absence of internal tensions between them. The latter simply does not logically follow from the former.

Therefore, the significance of the discussion of legitimacy of international law is not to *necessarily* find more moral principles or a better moral standard of international law, but first to carefully examine what the question really means, explore the nature of the concept of legitimacy, and only then investigate whether, in terms of substantive conceptions, there are indeed any such moral principles or that one moral standard which can function not just as goals, but also as the correct conception of legitimacy of international law. Assuming that the existing set of moral principles or moral standard is not merely goal(s) international law pursues and/or ought to purse, but also the most appropriate conception of legitimacy, already changes the question of whether there *is* a (moral) standard of legitimacy to the question *which* that standard is. Since moral principles are often enshrined in human rights, claiming that there *are* such moral principles, already seems to answer the question whether there is a fixed standard of legitimacy, and moves on to answer the next question, claiming that standard to be human rights. This kind of hasty discussion seems to have answered the question of legitimacy by having found the correct standard, when barely having asked the question of the nature of the concept of legitimacy and possible internal tensions within the advanced standard, let alone other conceptions. The importance of the inquiry is exactly to figure out if there are such principles, if so, what are they, how it is that they function as not only a goal but also a standard of legitimacy and why we should accept them among other alternatives; and if there aren't any other well argued alternatives, what does the question really mean? Indeed, the question of legitimacy will show that moral theorizing of international law, as in law in general, has more to do with understanding the nature of legitimacy as a concept, our fundamental understanding of what law is and, perhaps more importantly, what it is not, and internal tensions within advanced standards of legitimacy.

All this may sound very disappointing, as the reader may feel that the discussion may yield no 'practical' results. Yet, clarifying misconceptions of other theories which attempt to yield such results, establishing the right framework for the legitimacy discussion and understanding the nature of the concept of legitimacy, yields a much more useful result: a clearer understanding of international law as legal system and of law in general as a phenomenon.

Proper conceptualization of the discussion can induce agreement. Without a proper conceptualization of legitimacy, inflation of theories presenting substantive moral arguments as standards of renders the concept of legitimacy a perpetuating battleground of antagonising standards of legitimacy with no light at the end of the tunnel. One writer arguing for justice in the sense of protecting human rights, another writer arguing for peace and respecting, in the sense of not violating, human rights, and then the first writer moving to another view (Metaoordination view which we will refer to very briefly in the end of the discussion) does not lead the legitimacy discussion to any fruitful results. By contrast, by understanding the nature of legitimacy as an open-ended concept, i.e. a concept with no predetermined content, apart from a vague standard of properness (Tier 1 of the trichotomy of legitimacy), that obtains content from substantive conceptions, which will depend not only on objective criteria but also on the object in question and the context (circumstances), one understands that legitimacy being an essentially contested concept does not imply that the concept is essentially contested in all instances. Besides, the barriers between concept and conceptions may chang.[7] Clearly, 'legitimate daughter' is hardly contested, let alone essentially contested, but even with objects of legal form, legitimacy being an essentially contested concept means that it *can* be so, not that it is always so. In the case of legitimacy of international law, it is indeed so because of the way it has been construed. Understanding that legitimacy is an essentially contested concept because of the high level of abstraction of its minimal content (vague standard of properness), helps us frame the legitimacy discussion properly: instead of projecting predetermined criteria to legitimacy, it is best to, when deploying the concept of legitimacy to evaluate an object

[7] "The distinction between a concept and its conceptions is not hard and fast. It might shift over time as ideas get settled and then unsettled again. It might shift in the course of a single conversation, as we struggle to clarify where we disagree, and make judgments about whether, for a particular question, ordinary linguistic usage is more or less illuminating than stipulative definition, or whether highly moralized thick terms are more or less useful than relatively thin descriptions." Arthur Isak Applbaum, 'Legitimacy without the Duty to Obey' (2010) 38 Philosophy & Public Affairs 215, 216.

of legitimacy, consider first what is the *appropriate* standard given the object and the context, and then consider whether the standard itself does not suffer from internal tensions such as a plurality of principles without hierarchy, sufficient prioritisation or specificity in order to yield content concrete enough to act as standard. Proper understanding of legitimacy will render us immune to becoming victims of misleading narratives. I will get back to such final reflections when I conclude the discussion.

For now, having stated the thesis, that legitimacy is an essentially contested concept, and sketched the argument, I will proceed to presenting the trichotomy of legitimacy.

CHAPTER 2
Trichotomy of Legitimacy – Tiers 1 & 2

2.1. Introduction: Trichotomy of Legitimacy

We think through language. Concepts are expressed with words. Inevitably, to reach a concept, we must start with words/terms used to express the concept. In doing so, one must be careful so as not to use words that merely refer to certain meanings of the concept. For example, a complete account of the concept of 'justice' is impossible if one traces uses of the term that refer merely to the Rawlsian conception of justice, as that would entail losing sight of the traditional conception of justice, which is protecting or not violating human rights. What we reach by accounting for all uses of a concept is the most abstract account of a concept, i.e. the concept in its most abstract form. This is what I call Tier 1. We can imagine this level of concept being at the top of the pyramid, or the ladder of abstraction. As we climb down the pyramid, or lower the concept in the ladder of abstraction, the concept becomes more specified. In the second level, Tier 2, legitimacy is related to law. In particular, legitimacy is linked with the four object types of legal form, namely individual law, action, actor, and legal order. In the lower level of the pyramid or the ladder of abstraction, Tier 3, legitimacy is most specified. This is the level of normative conceptions of legitimacy. As regards that final tier, in this discussion, only certain normative conceptions of legitimacy of international law will be discussed.

Many points in this chapter rely on Applbaum's work. This is barely a choice: Applbaum's work is the only work in contemporary literature engaging with legitimacy in the same manner as in this discussion. First, Applbaum deals with normative, not descriptive legitimacy such as Thomas Franck. Second, Applbaum does not deal with specific normative conceptions of legitimacy, but with concept analysis of legitimacy, as is this discussion. To the extent of my knowledge, he does not conceptualise legitimacy in a trichotomy, which is a novelty of this discussion, nor does he reach the claim that legitimacy is an essentially contested concept. He does, however, in line with what this discussion is about, reach, in a logical, consistent and generally valid route of conceptual analysis of legitimacy, important claims regarding the nature of legitimacy.

2.2. Tier 1: Legitimacy in Abstracto

In this tier, the concept of legitimacy is most abstract. This is the concept of legitimacy *per se*: detached from any context. Imagine a ladder of abstraction where the higher a concept lies in the ladder, the more abstract it becomes; respectively, the more we lower the concept in the ladder of abstraction, the more specific and concrete it becomes, thus procuring more meaning and content. The first is the highest tier of the ladder, the concept of legitimacy in its most abstract form.

How do we reach the concept of legitimacy at the top tier of the pyramid, Tier 1, i.e. legitimacy at its most abstract form? We trace different uses of the term 'legitimacy' which are as unrelated as possible and find the commonality between them which identifies the content of the concept. This methodology is dictated by the nature of the object of study: concept. In order to analyse the concept detached from its conceptions, it is only inevitable that we refer to instantiations of this concept.

Since it is not the first time this methodology has been deployed in the field, it is worth mentioning a notable previous use: Hart. Finnis correctly points out that Hart, trying to define law, is using an array of instances where 'law' is used, and he looks for that common element among them, which is the minimum content of the concept.[8] 'This one thing common is the criterion of the 'essence' of law, and thus the one feature used to characterize and to explain descriptively the whole subject-matter.'[9] This is how Hart, by comparing 'moral law', 'international law' etc., ends with a sine qua non for law, namely rules for guidance for officials and citizens. Since law regulates a society, rules are an essential component of law. Like Hart, we are trying to appeal to the 'components of the concept.'[10]

There are two notable differences with Hart that the methodology here with the instances of legitimacy ought to be contrasted with. First, Hart is using instances of where the word 'law' is used, whereas I am referring to instances where the concept of legitimacy is deployed. As we shall see later, word, concept and conception (of a

[8] John Finnis, Natural Law and Natural Rights (OUP 1980), 6-7.
[9] Ibid, 6.
[10] Ibid, 7.

concept) can be three quite distinct things. Although this difference will not come to play in the specific examples used, it is present in principle: Plato and Aristotle were Greeks, wrote in Greek, and did not use the English term 'legitimacy', even though they did refer to the concept, as we shall see. The other difference is the level of abstraction. 'Moral law' and 'international law' are indeed different things and it is true that by detecting the common element between them, we reach the necessary component of law: regulation of behaviour, rules of conduct. Notably, both these examples are in the same level of abstraction. By contrast, although it is clear what is meant by 'legitimate daughter' (born in marriage), it is not so clear what is meant by 'illegitimate law' – is it illegitimate because of its content, e.g. it sends Jews to genocide or political dissidents to their deaths, or is this law illegitimate because even though of good content it was laid down by improper procedure, e.g. by a military coup instead of by the procedures described n the constitution? As we shall see, this difference is due to the nature of legitimacy being contextualised by conceptions/standards when attached to specific objects, whereas this is not the case with the concept of law.

It could be argued that Austin gave his own 'conception' of law[11]; is there any relevance with the conceptual analysis in this discussion which is premised in the distinction between the word, concept and conceptions of the concept? The answer is negative. When Austin presents a 'conception' or 'definition' of law, what he is in fact doing, is answering a very specific question, irrelevant to the conception vs concept issue which is the crux of this thesis. In particular, Austin, being a consistent legal positivist, asks the following question: what makes law legally valid? Austin replies: it being a command of the sovereign backed by threat. One could label Austin's answer as 'Austin's conception of law.' He would not be wrong, but he would not be relevant to our discussion either, because in our discussion, the task is one of conceptual analysis, not addressing a specific question of legal validity. This confusion would be best avoided is Austin was not referred to as having presented 'a conception of law', but rather having addressed the question, in consistency with legal positivism, of what makes law legally valid. Hart addressed this question as well; but the similarity with finding the commonality between many uses of legitimacy to reach its minimum

[11] Finnis, (n 8), 4.

content is not in the rule of recognition but in detecting common elements between instances of law.

What are then, such uses of 'legitimacy' and what is then the commonality between them? "In ordinary language, we say, 'legitimate argument,' 'legitimate self-defence,' 'legitimate theater', legitimate daughter,' legitimate monarch,' and 'legitimate state,' but beyond sharing some vague notion of properness, these uses do not share much."[12] Legitimacy in its most abstract form, Tier 1, is a vague notion of properness. I will elaborate on this in the next few paragraphs.

In political science, legitimacy is the right and acceptance of an authority, usually a governing law or a regime. Whereas 'authority' denotes a specific position in an established government, the term 'legitimacy' denotes a system of government. An authority viewed as legitimate often has the right and justification to exercise power. In Chinese political philosophy, since the historical period of the Zhou Dynasty (1046–256 BC), the political legitimacy of a ruler and government was derived from the Mandate of Heaven, and unjust rulers who lost said mandate therefore lost the right to rule the people. In moral philosophy, the term 'legitimacy' is often positively interpreted as the normative status conferred by a governed people upon their governors' institutions, offices, and actions, based upon the belief that their government's actions are appropriate uses of power by a legally constituted government[13]. Hobbes held that in the state of nature, everyone's self-preservation is under threat, the natural right to self-preservation cannot be relinquished and political authority is created by the social contract with which people authorize a sovereign to guarantee their protection; political authority is legitimate as long as the sovereign ensures the protection of the citizens (*Leviathan*, Chapter 21).

'Legitimate daughter' though seems to suggest something quite different. Legitimacy, in traditional western common law, is the status of a child born to parents who are legally married to each other, and of a child conceived before the parents obtain legal divorce. Conversely, illegitimacy (or bastardy) has been the status of a child born

[12] Arthur Isak Applbaum, 'Legitimacy without the Duty to Obey' (2010) 38 Philosophy & Public Affairs 215, 217.
[13] See, e.g. Martha Lizabeth Phelps, 'Doppelgangers of the State: Private Security and Transferable Legitimacy' (2014) 42 Politics & Policy 824.

outside marriage, such a child being known as a bastard, or love child, when such a distinction has been made from other children. Depending on local legislation, legitimacy could affect a child's rights of inheritance to the putative father's estate and the child's right to bear the father's surname or hereditary title. The Legitimacy Act 1926[14] of England and Wales legitimized the birth of a child if the parents subsequently married each other, provided that they had not been married to someone else in the meantime. The Legitimacy Act 1959 extended the legitimization even if the parents had married others in the meantime and applied it to putative marriages which the parents incorrectly believed were valid. Clearly, legitimacy here pertains to legal rights of the child. Yet, it is hard not to notice a moral implication here. Centuries ago, legislation according to which children born within marriage had certain rights contrast to children born outside marriage was reflecting public morals. At those times, it was regarded as immoral to have children outside marriage and in many cases such an event was even a cause of shame to the child, especially to the daughter, and the probably to the mother. 'Legitimate daughter' then seems to refer to both the legality and morality of birth, so to speak.

How about 'legitimate self-defence'? Does it also conflate legality with morality? In *Leviathan* (1651), Hobbes (using the English term 'self-defence' for the first time) proposed the foundation political theory that distinguishes between a state of nature where there is no authority and a modern state. Hobbes argues that although some may be stronger or more intelligent than others in their natural state, none are so strong as to be beyond a fear of violent death, which justifies self-defence as the highest necessity. In the state of nature, there is no authority, no organized society, no state and no laws. Therefore, the right to self-defence cannot be referring to a legal right, i.e. the right to self-defence granted by law. The right being a non-legal right seems to lead to the conclusion that the right is moral. This claim seems to rest on the premise that the binary 'legal-moral' covers all possibilities. However, it could be argued that although defending others against an aggressor is moral, defending myself against an aggressor is mere prudence or an act of rational self-interest, not moral per se. Therefore, it could be argued that the right to self-defence could be understood as being a right based on prudential reasons/reasons of self-interest and reasons of necessity. This understanding

[14] Legitimacy Act 1926 (16 & 17 Geo. 5 c. 60).

is compatible with Hobbes' understanding of self-defence as being 'justified'. Many moral philosophers would draw a distinction between an action being 'moral' and an action being 'justified'. An action being 'moral' means that it derives from valid moral principles, whereas an action being 'justified' means it is permitted all-things-considered, which includes reasons of self-interest/prudential reasons which are not moral. However, such a distinction seems to be conflated by Article 12 of the Universal Declaration of Human Rights, according to which:

'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

Article 12 seems to make no distinction between defending oneself (prudence/self-interest) and defending family members (morality). Article 12 is of course a legal clause, thus stating a legal right, but being a human right, it is also the legal manifestation of a moral right. The right to self-defence then, could be understood either as a justified action based on all-things-considered judgement when defending oneself and a moral right when defending others, or a moral right covering both such instances.

How about the legitimate right to self-defence of states? In his 1625 magnum opus *The Law of War and Peace*, Hugo Grotius stated that "Most Men assign three Just Causes of War, Defence, the Recovery of what's our own, and Punishment." Again, 'legitimate' here could be understood as meaning 'moral', or 'justified' (all-reasons-considered) which is broader than just moral. In either case, 'legitimate' here would be contrasted, like with individual self-defence, to 'legal', which is determined according to the relevant international legal rules, namely Article 51 of the UN Charter and the legal right of self-defence of states according to customary international law.

Finally, the interesting choice of words 'legitimate argument' clarifies that legitimacy as a concept does not only pertain to morality (or prudence/self-interest) but also to notions of properness entirely irrelevant to legality and morality. Thus, 'legitimate argument' may simply mean a valid argument, i.e. an argument in which it is impossible for the premises to be true and the conclusion false at the same time. Alternatively, it may mean a strong argument, i.e. an argument in which it is *nearly* impossible for the

premises to be true and the conclusion false at the same time. It may mean a good argument, i.e. a valid or strong argument, or it may mean a valid argument where all the premises are true. Although the terms 'valid argument', 'true/false premises', 'strong argument' and 'good argument' have a specified meaning when referring to arguments, the term 'legitimacy' in these instances does not; it is a matter of fact whether in the context of a specific conversation the specific meaning of 'legitimate argument' is demonstrated. However, although the specific meaning of these terms varies, we can elevate legitimacy higher in the ladder of abstraction, in order to examine if there is any commonality between them. What do these meanings of 'legitimate argument', i.e. valid argument, strong argument, good argument, have in common? Since the characterization as 'legitimate' is not ascribed to specific claims, premises or conclusion, but to the argument in its entirety, and since the difference between an argument and a series of premises is that the former includes the logical procedure from which we move from certain claims, the premises, to another claim, the conclusion, a commonality between the meanings of 'legitimate argument' could be properness of procedure.[15]

Properness of procedure may as well be the commonality between legitimacy of a monarch, a state, a daughter and an argument. If only the son of the deceased king ought to be king, then only that son is the legitimate monarch. If Donald Trump was indeed loser of the national vote and won the elections with the help of Russian intelligence operatives, if George W. Bush was loser of the national popular vote and if Barack Obama was not born in the USA, then these presidents are illegitimate because, like the daughter born out of wedlock, their terms in office were conceived through improper procedure.[16]

However, properness of procedure seems to still be not high enough in the ladder of abstraction in order to capture the entire spectrum of possible meanings. The criterion of properness extends to substantive, aside from procedural, matters. It is with this meaning that the US legal order of the 18th century is illegitimate, as it violated, or at

[15] Since 'strong argument' may refer to an argument where, among other things, all premises are true, and truth value of premises is a substantive and not procedural issue, one can easily observe the extension of the concept of legitimacy from procedural to substantive from the use of the concept in 'legitimate argument', before even continuing to the further point.
[16] Arthur Isak Applbaum, *Legitimacy: The Right to Govern in a Wanton World* (forthcoming, March 2018 draft on file with author), 3.

least failed to protect, basic human rights of a large part of its population, the slaves. The illegitimacy here does not rest on properness of procedure, but on properness of substance: the content of fundamental legal norms.

Indeed, the only connection between several instances of legitimacy, such as legitimacy of a monarch, a state, a daughter and an argument that we examined above, is a notion of properness. 'Legitimate daughter' means a daughter born 'properly', i.e. within marriage, without necessarily separating legality from morality. 'Legitimate self-defence' refers to a right, both legal and moral, with stress on the latter, that is proper for individuals and states to have. 'Legitimate argument' means a proper argument, here in the sense that it has been derived with a proper procedure. 'Legitimate state' and 'legitimate monarch' mean proper state or monarch, typically in the sense that the state or the monarch is justified in exercising power. At its most abstract level, Tier 1, legitimacy is not more specific than a vague notion of properness.

An objection could be raised here. If legitimacy does not only pertain to law and is much more abstract, a vague notion of properness, how is it then, that earlier uses of the word 'legitimacy' coincided with 'lawful'? Does this not cause conceptual confusion? None of the uses of the term we examined is a metaphorical use.

Indeed, it has been documented in the literature that earlier uses of 'legitimacy' referred to 'lawful'. Thus, to say that something was 'legitimate' was to say that it was 'in accordance with the law', perhaps with the most fundamental laws of society.[17] Applbaum states that the earliest work he has found 'that uses 'legitimacy' as the primary normative term of art by which to evaluate rulers is the *Vindiciae Contra Tyrannos*.'[18] This piece of writing was probably written around 1575 and it was published in 1579. It constitutes a great contribution to the Huguenot resistance[19] literature. The justification of resistance to tyranny is attributed to Philippe de Plessis-

[17] Kristian Steiner, *Strategies for International Legitimacy, A Comparative Study of the Elite Behaviour in Ethnic Conflicts* (Lund University Press 1996), 23, in Martti Koskenniemi, 'Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism,' 7 Associations: Journal for Legal and Social Theory (2003) 349, 358.
[18] Applbaum, (n 16), 26.
[19] Huguenot rebellions, also called Roman wars, after the Huguenot leader Henri de Rohan, were three rebellions of French Calvinist Protestants (Huguenots), mainly located in southwestern France, against royal authority in 1620's.

Mornay (1549-1623), a young Protestant aristocrat who served Henri of Navarre as military officer, diplomat and counsellor. It is possible that authorship has been shared with his older friend, Hubert Languet (1518-1581).[20] The *Vindiciae Contra Tyrannos* was written only a few years after the St. Bartholomew's Day Massacres of 1572 and among the French Protestant works of political thought that address the question of justified resistance, it is the most developed and most influential. However, it is not the most original – that would be either François Hotman's *Francogallia* or Théodore Beza's *Right of Magistrates*. But unlike Hotman, Beza or Bodin, the major absolutist writer of the day, the *Vindiciae* reputedly deployed the term 'legitimacy' as a normative property of rulers that did not simply mean legality or procedural correctness.[21]

Earlier uses of the term, however, cause no conclusion whatsoever, as long as one makes the distinction between the word/term, and the concept. Words may refer to entirely different concepts or things. For example, 'pool' may refer to a man-made area of water (swimming pool) or to a game where players try to put the coloured and numbered balls into the holes around the edges of the table (billiards). 'Nails' are the hard parts of fingers and toes, but also thin, sharp metal pieces used in construction. The word 'bank' may refer to the financial institution or to the side of a river. In these cases, the words have more than one meanings/concepts at the same point in time. It is also possible for words to change the concept they refer to through time. The word 'gay' used to mean a light-hearted, cheerful and happy man, whereas now it means a homosexual man. In the instances mentioned in the previous paragraph, the word 'legitimacy' meant 'lawfulness'. In other words, the term 'legitimacy' was not deploying the concept (that we now discuss as) legitimacy, but the concept (that we now discuss as) lawfulness. The concept we now discuss as 'legitimacy' is a vague notion of properness (Tier 1). In abstracto, it is void of concrete meaning. It thus more commonly discussed in more specific contexts, which specify the vagueness of properness. What happens to this vague concept when lowered in the ladder of abstraction?

[20] Skinner attributes it to Mornay. See Quentin Skinner, *The Foundations of Modern Political Thought Vol. II* (CUP 1978), 305, whereas Garnett, who prepared the excellent and painstaking contemporary translation, concludes that the work most likely is the result of close collaboration with Languet, see Stephanus Junius Brutus, the Celt (pseud.), *Vindiciae, contra tyrannos: or, concerning the legitimate power of a prince over the people, and of the people over a prince* (1579), ed. George Garnett (CUP 1994), lxxvi, in Applbaum, (n 16), 26 note 19.
[21] Applbaum, (n 16), 26.

2.3. Tier 2: Legitimacy in Law

In the Tier 2, the concept of legitimacy is lower on the ladder of abstraction, if looking from above (Tier 1); or higher, if looking from lower, from the point of view of a more specified concept (Tier 3). The crucial characteristic of the second tier is that legitimacy here relates to the four object types of *legal* form. We are not referring to legitimacy of an argument any longer. The concept here becomes legally relevant.

Legitimacy is linked with four object types of legal form: actions (e.g. an invasion), norms (customary right to self-defence), actors (e.g. states, international organizations) or legal systems (domestic or international).[22] Legitimacy of each of these object types can be treated separately, even in the same factual context.[23] Hence, the US invasion of Iraq (an action) could be criticized as illegitimate, even by those who still recognized the legitimacy of the USA (an actor) as a state and major power, while the USA criticized the legitimacy of existing restrictions (norms) on self-defence, and others criticized the Security Council (an institution, thus actor) for being illegitimate because it failed to prevent the invasion, or the international legal order (a system) for proving so impotent.[24]

It is rightly argued that influences between objects of legitimacy do not entail legitimacy assessments of the objects not functioning independently. Indeed: The legal, economic, social and cultural links between various objects of legitimacy ensure that what affects one will often affect another. In the short term, however, even intimately connected objects tend to operate, for legitimacy purposes, independently. Hence, the WTO's dispute settlement system may be said to enjoy widespread legitimacy even though panels may occasionally issue reports that are considered seriously deficient, and the UN Security Council may retain legitimacy even when it struggles to confront

[22] See Katharina P Coleman, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (CUP 2007) 20–23. Similarly, David P Rapkin and Dan Braaten suggest 'actors [...], ideas, ideologies, norms, rules, policies, or actions ...': 'Conceptualising Hegemonic Legitimacy' (2009) 35 Review of International Studies 113, 117. '[Legitimacy theory] now encompasses acts, persons, roles, and rules, hence the structure of relations and groups, and the groups themselves (particularly important to the legitimation of emerging nations)': Morris Zelditch, Jr, 'Theories of Legitimacy' in John T Jost and Brenda Major (eds), *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (CUP 2001) 33, 40.

[23] Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007), 7 and Coleman (ibid), 23.

[24] Christopher A. Thomas, 'The Uses and Abuses of Legitimacy in international Law' (2014) 34 Oxford Journal of Legal Studies 729, 746.

massive human rights violations in Syria. Depending on the object of legitimacy, different legitimating mechanisms may apply, and its legitimacy may be subjected to greater or lesser scrutiny. When engaging in legitimacy debates, it is thus important to be clear about exactly what one is arguing to be legitimate or illegitimate.[25]

This does not prevent certain objects of legal form, let's call them derivatives, deriving their legitimacy from other objects of legal form. Although the four objects of legal form *can* be evaluated separately legitimacy-wise, it is not impossible for some objects of legitimacy to be legitimate *because* they have been issued by another object of legitimacy, assuming the latter is legitimate. Assume that the UNSC is legitimate. Although some decisions of the UNSC may be illegitimate, many decisions of the UNSC may be legitimate *because* they are decisions of the UNSC, i.e. they derive their legitimacy from the UNSC; in other words, the UNSC, an actor, confers legitimacy on decisions, which are a different object of legal form, namely actions. We can see the decisions here as being the derivative. We do not always need to argue or prove the legitimacy of the derivative separately and it may be the case that once the initial object of legal form is legitimate, evaluating (legitimacy-wise) the derivative separately will come into play if the grounds of the criticism are such so as to render the derivative illegitimate, and these are probably independent grounds: the grounds based on which a UNSC decision may be illegitimate (e.g. political pressure or threats against a permanent member) are independent of the reasons why the USNC is legitimate (peace and stability).

2.3.1. Normative vs. Descriptive Legitimacy

Having clarified what could possibly be the object of legitimacy at this tier and that legitimacy here is legally relevant, what then, one would now ask, does legitimacy mean? The kind of properness implied here is surely not the same as in the 'legitimate argument'. What is the discussion about? Philosophical and legal literature usually begin the legitimacy discussion, typically defining it roughly as a moral right to rule.[26] At this point, a crucial distinction is at place. Indeed, for conceptual analysis to be precise, one has to distinguish two different concepts which hide behind the same word.

[25] Ibid.
[26] See, e.g. Applbaum, (n 12), 216: 'In specifying the concept of legitimacy fruitfully, and in distinguishing the concept from its various conceptions, we might begin with the rough notion that the concept of legitimacy is about the right to rule.'

Therefore, the discussion begins with the crucial distinction between normative legitimacy and descriptive (or sociological or perceived) legitimacy. The distinction is crucial because, as the following analysis will illustrate, the concept of legitimacy is deployed merely by normative legitimacy, whereas sociological legitimacy is a rather deceiving term which deploys a concept pertaining to human attitudes.

As is often stated, normative legitimacy is genuinely having the moral right to rule, whereas descriptive legitimacy is the social fact that people believe an object of legitimacy has the moral right to rule; it is also sometimes added that 'descriptive' or 'sociological legitimacy', pertaining to nothing more than human perceptions towards legitimacy, is a misleading way of referring to 'perceived legitimacy'.[27] The right to rule is the moral right to create legally binding rules. The necessary and sufficient conditions for this moral right to obtain is a matter of normative conception of the concept of legitimacy (Tier 3), whereas what necessarily is the content of the concept of legitimacy is a matter of conceptual analysis (Tier 2).

Descriptive or sociological legitimacy is best illustrated with examples. Suppose that in ancient kingdom, people *believe* that absolute kingship which has been traditionally laid down from one king to the other is legitimate legal order. This descriptive claim yields the standard of descriptive or sociological legitimacy, not normative legitimacy. It is a social fact about human attitudes, i.e. what people believe. The investigation of the behaviour of addressees of law yields the standard of descriptive or sociological legitimacy. The question asked here is essentially what people believe, or better say, whether people believe that a legal order, a state, an action or any object belonging to any of the four object types of legal form, is legitimate, regardless of whether it is true

[27] See, e.g. Arthur Isak Applbaum, 'Legitimacy in a Bastard Kingdom' (2004) Center for Public Leadership Working Paper 04–05 <https://dspace.mit.edu/bitstream/handle/1721.1/55927/CPL_WP_04_05_Applbaum.pdf?sequence=1> accessed 24 March 2018, 73, 76; also, 'An institution that attempts to rule (govern) is legitimate in the normative sense if and only if it has *the right to rule*.', whereas 'Calling an institution legitimate in the sociological sense is a misleading way of saying that it is widely *believed to have the right to rule*.' In Allen Buchanan, 'The Legitimacy of International Law,' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), 79; also, 'Sometimes it is unclear whether 'legitimacy' is being used in a descriptive or a normative sense. … I am concerned exclusively with legitimacy in the normative sense, not with the conditions under which an entity is believed to be legitimate. This is a notable distinction, not least because much of the literature on international law uses 'legitimate' to mean 'is believed to be legitimate'.' in Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2003), 235; also, Allen Buchanan, *The Heart of Human Rights* (OUP 2013), 112.

or not. To push things a little further, if people believe that Nazi legal order is a legitimate, or North Korea is a legitimate state or that the US-UK attack on Kosovo was legitimate, or an international legal order which allows for piracy is legitimate, these beliefs would answer the question of descriptive or sociological legitimacy.

A sociologist could then engage with a further descriptive inquiry, asking *why* it is that people hold these beliefs, why people feel this way, why people believe the object in question (law, legal order, state, action, etc.) is legitimate. The answer to the question why people believe an object of legitimacy is legitimate or illegitimate could be called the standard of descriptive/sociological/perceived legitimacy.

According to Weber, all such standards fall under only three categories of legitimation strategies which he calls 'pure types'. First, legal authority is based on a system of rules that is applied administratively and judicially in accordance with known principles. The persons who administer those rules, the superiors, are appointed or elected be legal procedures, and they are oriented toward the maintenance of the legal order. The people subject to their command obey the law instead of implementing it. Superiors are also subject to rules that limit their powers, separate their private lives from official duties and require written documentation for transactions to be valid.[28] So people could even regard Nazi rulers as legitimate, regardless of whether they were in fact legitimate, merely because the Nazi rulers, some appointed some elected (like Hitler), had legal authority based on a system of rules that was applied administratively and judicially, they were oriented toward the maintenance of the legal order, people subject to their command obeyed the law instead of implementing it, etc. Second, legitimation based on traditional authority is the belief that an authority is legitimate because it 'has always existed'. People in power usually enjoy it because they have inherited it. Officials consist either of personal retainers (in a patrimonial regime) or of personal loyal allies, such as vassals or tributary lords (in a feudal society). Their prerogatives are usually similar to those of the ruler above them, just reduced in scale, and they too are often selected based on inheritance.[29] For example, people of an ancient kingdom could regard their king as legitimate, merely because kingship 'has always existed'. Finally, charismatic authority is based on the charisma of the leader, who shows that he

[28] Reinhard Bendix, *Max Weber: An Intellectual Portrait* (University of California Press 1977), 294.
[29] Ibid, 295.

possesses the right to lead by virtue of magical powers, prophecies, heroism, revelations or other extraordinary gifts. His followers regard him as legitimate because they believe in his unique extraordinary qualities (his charisma), not because of any tradition or legal rules.[30] Some people in North Korea who have been brainwashed by the regime believe that their dictator is a legitimate ruler because they regard him as a charismatic ruler who is always right in virtue of magical powers. Weber maintains that in history, these 'pure types' are always found in combination.[31]

Despite Weber's account, there is theoretically no limit to what could drive human minds to regard an object of legitimacy as legitimate or illegitimate. In this regard, Frank investigates what it is that makes subjects of law obey certain laws even in the absence of coercion, what he calls 'pull to compliance.'[32] Many such questions can be asked, and these questions are sociological, like the inquiry of what the effects of law are in a society. Such is the sociological inquiry of whether people believe an object of legitimacy is legitimate. This inquiry is purely descriptive as it merely describes the world as it is.

To sum up then, descriptive or sociological legitimacy is what people, a matter of fact, *believe* to be legitimate and perhaps on what grounds, regardless of whether they are right or wrong. Applbaum is correct to state that Weber's account of legitimacy is an exercise in descriptive social science, not normative political philosophy, and the object of description is the social fact that people have *beliefs* about the normative grounds of legitimacy.[33] Indeed, sociological or descriptive legitimacy is preferably referred to as *perceived* legitimacy and in any case a discussion best categorized as belonging in sociology of law or more generally social science.

By contrast, normative legitimacy invites a philosophical inquiry. Normative legitimacy means that the standard is what it is, regardless of what the standard is believed to be. It

[30] Ibid, 295-296.
[31] Ibid, 296.
[32] Thomas M Franck, 'Legitimacy in the International System' (1988) 82 (4) The American Journal of International Law 705, 705; see also, 'Legitimacy and Fairness' in *Fairness in International Law and Institutions* (OUP 2011) where he explains that the degree to which a rule is *perceived* as legitimate is itself affected by certain intrinsic properties both of that rule and of the process by which it was made, and the process of its interpretation by judges and officials and he discusses four indicators of legitimacy (in a sociological sense), namely determinacy, symbolic validation, coherence, and adherence.
[33] Applbaum, (n16), 78.

is indifferent to people's beliefs and it is interested in norms and moral concepts: what *is* the standard of legitimacy? The philosophical inquiry here is not what people happen to believe that the normative grounds are, but the normative grounds themselves. What is legitimacy as a concept? Is there a standard by which law, legal orders, legal entities, etc. can be morally evaluated? *Ought* law be in a certain way? It is those normative grounds that we are looking for. Clearly, this discussion pertains exclusively to normative legitimacy.

Having distinguished descriptive from normative legitimacy, it is reasonable to expect an analysis of the connection, if any, between the two. I will explain how it is that as a matter of conceptual analysis, there is no necessary connection between descriptive and normative legitimacy; any connection between them would be a matter of normative conception of legitimacy – which would belong to Tier 3 – and in my opinion false, as will be explained below.

There seem to be writers who assume a connection between normative and descriptive legitimacy. For some, "descriptive legitimacy seems conceptually parasitic on normative legitimacy since beliefs about legitimacy are usually beliefs about whether an institution, as a normative matter, has a right to rule."[34] Obviously the connection here is wrongly assumed: beliefs may be mistaken. If such a mistake was not a possibility, the one sense of legitimacy would be a manifestation of the other. The possibility of error, as a matter of logic, not fact, i.e. regardless of the how often it occurs as a matter of fact, entails that human attitudes may falsely deploy the concept of legitimacy, so there is only the impression of legitimacy being discussed, whereas the discussion is merely about human beliefs, not legitimacy.

> On the other hand, some argue the other way around, that normative legitimacy depends on descriptive legitimacy. It has an intrinsically social quality and depends on people's beliefs. An institution could not be normatively legitimate if no one thought so. As Andrew Hurrell (2005: 29) argues, legitimacy is "quite literally meaningless outside of a particular historical context and outside of a particular set of linguistic conventions

[34] Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2013), 327.

> and justificatory structures. To paraphrase Ronald Dworkin, legitimacy has no DNA.[35]

Bodanksy goes on however to rightly disagree with those illusory connections and agree with the normative/sociological distinction as illustrated above:

> But the normative and descriptive/sociological perspectives on legitimacy clearly differ. If we ask what makes an institution *normatively* legitimate, the answer will depend on arguments about moral, political, and legal theory. In contrast, if we ask what makes an institution *descriptively* legitimate, the answer will depend on empirical and explanatory arguments about what people believe and why. Normative legitimacy depends on whether an institution *objectively* has a right to rule – whether its claim is in some sense true. It focuses on qualities of the ruler that morally justify its authority – for example, its democratic pedigree, transparency or expertise. In contrast, descriptive legitimacy concerns whether actors *subjectively* believe that an institution has a right to rule. It focuses on the attitudes of the ruled, rather than on the qualities of the ruler, and this reflects 'not the truth of the philosopher but the belief of the people' (Clark 2005: 18, quoting T. Schabert). An institution is descriptively legitimate when it is socially sanctioned (Reus-Smit 2007: 158) and when people tend to follow its decisions not because of self-interest or compulsion, but because they accept the institution's right to rule (Hurd 1999).[36]

Bodansky correctly makes the point that the distinction of descriptive and normative legitimacy itself makes it clear there is no necessary connection between the two. Finally, Applbaum illustrates and exemplifies the point with utmost clarity:

> But it is a conceptual confusion to hold that 'legitimate' simply means 'believed to be legitimate,' for descriptive legitimacy is parasitic on the conceptually prior idea of normative legitimacy. What is supposed to be the content of these beliefs about legitimacy? Consider: when the objects of this social scientific description, the members of some political society, believe that a rule or a ruler is legitimate, they are not (or not simply) engaging in their own social scientific description of each other's beliefs. If that were so, when the citizens polled by the Los Angeles Times were asked 'Is Bush legitimate?' each would have to answer 'I don't yet know— I haven't seen the results of this poll.' What descriptive legitimacy describes are views about normative legitimacy. (This is so, by the way, even if normative legitimacy does not exist, which would be the case if various forms of moral skepticism or anarchism were true. Unicorns do not exist either, but the idea

[35] Ibid.
[36] Ibid, 327-328.

of a unicorn does, and therefore one's beliefs about what a unicorn is can be mistaken.)[37]

Descriptive and normative legitimacy are clearly distinct. Two points of Applbaum ought to be stressed. First, descriptive or sociological or perceived legitimacy is not description of each other's beliefs, but views about normative legitimacy. Second, descriptive legitimacy is indeed parasitic on the conceptually prior idea of normative legitimacy but this does not establish a connection between descriptive and normative legitimacy, because it does not mean that the one is condition of the other. Descriptive legitimacy being parasitic on the conceptually prior idea of normative legitimacy is a claim entirely reducible to descriptive legitimacy being views about normative legitimacy; this claim merely tells us what descriptive legitimacy is. The complete independence of the one concept from the other is manifested by the last part: (not only normative legitimacy stands independent of descriptive legitimacy but also) descriptive legitimacy stands independent of normative legitimacy because people can have views about a concept (such as normative legitimacy), even if normative legitimacy does not exist, as is the case with unicorns and Santa Clause. Indeed, descriptive and normative legitimacy are entirely distinct. As will be soon discussed below, any connection between the two concepts – descriptive and normative legitimacy - is a matter of a specific normative conception of legitimacy, not a matter of conceptual analysis. To make it even clearer that there is no logical connection between descriptive and normative legitimacy, I will examine all possible logical connections descriptive and normative legitimacy may have.

What is, if any, the relationship between descriptive (sociological/perceived) and normative legitimacy? I will examine all the logically possible connections: descriptive legitimacy being *necessary and sufficient* condition for normative legitimacy, perceived legitimacy being a *sufficient* condition for normative legitimacy and perceived legitimacy being a *necessary but not sufficient* condition for normative legitimacy.

Is perceived legitimacy a *necessary and sufficient* condition for normative legitimacy? In other words, here we will examine whether the following claim could be sustained: an object is legitimate if and only if most people (for whatever the reason) believe that

[37]Applbaum, (n16), 79; Applbaum, (n 16), 19-20.

the object is legitimate. Notably, this is a claim about the normative criteria of legitimacy, i.e. a particular conception, and not a claim about the meaning of legitimacy, which is conceptually more primitive than social facts about beliefs about it.

> Though not incoherent, such a claim is mistaken. In most cultures over most of history, women have believed that their husbands had legitimate authority over them, but that didn't make it so. Similarly, the fact that people in a society believe that their rulers have legitimate authority, or the fact that the rulers of other societies believe that the rulers of the society in question have legitimate authority, doesn't make it so.[38]

Applbaum gives another reason why it is that perceived legitimacy is not a necessary and sufficient reason for normative legitimacy:

> Furthermore, it does seem that a conception of normative legitimacy that is wholly a function of beliefs about legitimacy fails the test of transparency, in that it depends on some people holding a different conception. Suppose a two-member polity is subjected to the rule of an outside ruler. Both members believe that the correct conception of legitimacy is that the ruler is genuinely legitimate just in case the other believes the ruler to be legitimate, and illegitimate just in case the other believes the ruler to be illegitimate. Neither has beliefs about the legitimacy or illegitimacy of the ruler, nothing else counts for or against legitimacy, and it is common knowledge between the two that this is their conception. Then there are two stable normative equilibria, legitimacy and illegitimacy, and this is so because there are two stable epistemic equilibria: both members' believing the ruler to be legitimate and both believing the ruler to be illegitimate. But there are no grounds whatsoever for choosing between the two equilibria. As specified, neither the members nor their conception can deliver an answer to the question "Is this ruler legitimate or illegitimate?
>
> This result generalizes to the N-person case in which the conception of legitimacy that everyone holds is that the ruler is legitimate if and only if n or greater out of N persons believe the ruler to be legitimate, for n greater than 0 and less than N. To tip one way or another, there need to be exogenous beliefs about legitimacy or exogenous presumptions in favor of inferring beliefs in legitimacy that are precluded by the theory. For even if we suppose that each member of this society subscribes to the general conception that genuine legitimacy is wholly a function of beliefs about legitimacy, but they hold varying specific values for the critical threshold n, ranging from the minimal threshold of n = 1 up to the demanding threshold of n = N-1, the cascade that will bring about unanimous justified belief in legitimacy (or, symmetrically, illegitimacy) cannot get started unless one person believes that the ruler is legitimate (or illegitimate). But this cannot

[38] Ibid.

> happen if all form beliefs about legitimacy in accordance with their conception: the cascade depends on someone believing in the legitimacy or illegitimacy of the ruler on different grounds, or on making a mistake in inference about the beliefs of others.
>
> In some games with multiple equilibria, aren't some strategies dominant? Yes, but this is not a game of strategy, in which players choose actions to their rational advantage. What to believe here is given by one's normative theory, and is not a matter of choice. Pascal's wager notwithstanding, a rational person cannot choose to believe. One can choose to consent, and on a normative account of legitimacy in which only consent matters, with the added assumption that it is to the rational advantage of each (or, on Kant's view, the duty of each) to live under legitimate rule, choosing to consent and thereby making the ruler legitimate is indeed a dominant strategy. But now consent, and not belief in legitimacy, is doing the work.[39]

Having established that perceived legitimacy is not a necessary and sufficient condition for normative legitimacy, we can now proceed to examine whether perceived legitimacy is merely a *sufficient* condition for normative legitimacy. Applbaum continues:

> The appeal of taking perceived legitimacy as a sufficient condition for genuine legitimacy may arise from conflating perceived legitimacy with consent. An obvious way that belief in legitimacy and consent can come apart is when the belief has been fraudulently manufactured. If I agree to be governed by the winner of an election who actually stuffed the ballot boxes, or if I agree to be governed by God's prophet who actually is a con artist, I have not genuinely consented. Perceived legitimacy and consent also can come apart in a deeper way. I can believe that a government has the right to govern us without our consent without that belief itself constituting consent. When the bastard Edmund's nonfictional contemporary, James I of England, argued for the divine right of kings, he explicitly denied that the legitimacy of his power depended on any sort of consent. Now imagine you are an English subject taught to believe that the king is God's lieutenant on earth, answerable to God alone. You chafe at James's violations of his subjects' liberties, and have the mischievous thought that if your consent mattered, you would not grant it, but, alas, you believe that consent doesn't matter. I think it odd to say of a person whose belief in the legitimacy of a ruler depends on the belief that human volition is irrelevant to legitimacy has consented to be ruled.[40]

The first point, belief having been fraudulently manufactured, is quite clear. It is indeed clear that legitimacy and consent come apart when subjects regard as legitimate the winner of an election, although they were unaware of the fact that the winner actually

[39] Applbaum, (n16) 79-80; Applbaum, (n 16), 20-22.
[40] Ibid.

stuffed the ballot boxes. Perceived legitimacy obtains because there is a belief (based on ignorance of crucial facts) that the object of legitimacy (actor; winner of the election) is legitimate. However, subjects of legitimacy have not consented in a genuine way, exactly because of ignorance of crucial facts. There are of course different theories about what consent involves and one possible theory, subjects consent merely by saying 'I consent' even if they do not know all the relevant facts. However, this would not be a 'genuine' consent; 'genuine' consent is a consent based on knowledge of all the relevant facts. Because of ignorance of crucial facts (winner stuffed the ballot boxes, actor is not God's prophet but a con artist), genuine consent is not granted. Yet, because of this ignorance, there is a belief that legitimacy obtains.

The second point is quite less clear. Indeed, by believing that the government has the right to govern us without our consent, we have not consented. Besides, holding that belief is perfectly consistent with strongly disagreeing to consent based on other grounds. In the example, the subject has been taught to believe that James I of England is legitimate because James is God's lieutenant on earth answerable to God alone. Thus, perceived legitimacy obtains. In order for perceived legitimacy and consent to come apart in this example, it has to be the case that the subject does not consent. We thus assume that that our subject does not consent to James because James violates the liberties of his subjects. Thus, perceived legitimacy and consent come apart. However, it is unclear how the subject would not consent to James because of violation of liberties, since the subject has been taught to believe that the king is God's lieutenant on earth and answerable to God alone. It seems to me that for the same reason why the subject would regard James as legitimate, i.e. for the same reason why perceived legitimacy would obtain, consent would also obtain. If I believe that king is legitimate because of his divine connection, I would consent for this same reason. If I believe that the king being God's lieutenant on earth and answerable to God alone is not enough for me to consent to be ruled by him because he violates the liberties of his subjects, I see no reason for believing any differently when it comes to whether the king is legitimate. It is indeed strange to say that someone believes that legitimacy of a ruler does not depend on consent, and that person consented. It is not entirely clear though how this example shows perceived legitimacy and consent coming apart.

Regardless of the issue of consent, the same type of examples which proved that perceived legitimacy is not a necessary and sufficient condition for normative legitimacy, also prove that perceived legitimacy is not a (merely) sufficient condition for normative legitimacy. In most cultures over most of history, women have believed that their husbands had legitimate authority over them, but that didn't make it so. Similarly, imagine a legal order where citizens are brainwashed to believe that the government is legitimate, while it is committing horrendous atrocities like ethnic cleansing. This regime is legitimate in a descriptive/sociological sense because citizens believe that the government is legitimate, but the government is illegitimate normatively speaking. Perceived (sociological) legitimacy is *not* a *sufficient* condition for genuine (normative) legitimacy.

Could perceived legitimacy be a *necessary but not sufficient* condition of genuine legitimacy? The answer is that perceived legitimacy is not a necessary condition for genuine legitimacy, i.e. there is no necessary connection between the two as a matter of conceptual analysis, but perceived legitimacy could be a necessary condition of normative legitimacy in the context of a specific normative *conception* of legitimacy. Suppose that people in post war Germany had felt that the government of the Allies was illegitimate; it would still be legitimate. Descriptive legitimacy is not a necessary condition for normative legitimacy. Thus, the only way descriptive legitimacy could be relevant to normative legitimacy, is by descriptive legitimacy being a condition of a substantive normative conception of legitimacy. Applbaum is states that: "…descriptive legitimacy might be a necessary but not sufficient condition of normative legitimacy. This would be so if some measure of effectiveness were a condition for the justified exercise of coercive control, and the perception of justification were necessary for effectiveness."[41] I would not be too quick to identify descriptive legitimacy/perception of justification as necessary for effectiveness. It is possible for coercive control to be exercised effectively, without perceived to be legitimate or justified. Suppose that most North Koreans (not only the ones that attempt to flee) regard the North Korean legal order as illegitimate and its exercise of coercive control as unjustified. Even if so, the North Korean legal order is effective.

[41] Applbaum, (n 16), 80.

Regardless, in more general terms, although there is no connection between descriptive and normative legitimacy, one could construe a conception of normative legitimacy in such a way so as to include descriptive legitimacy among the necessary conditions of normative legitimacy. For example, one could argue that a legal order is legitimate if and only if it is minimally democratic, protects fundamental human rights of all *and* is regarded as legitimate by its own subjects. Although such a conception of normative legitimacy is possible, it would be, in my opinion, problematic, because it could be the case that a legal order which satisfies the other requirements apart from descriptive legitimacy, fails the latter exactly *because* it satisfies the other necessary requirements. In the same example, imagine a society which regards their legal order as illegitimate *because* it is minimally democratic – suppose the subjects are religious fanatics who believe only representatives of God should rule by divine mandate -, and *because* it protects fundamental human rights of all - suppose the subjects believe that minorities of different religious groups should not enjoy all fundamental rights. In this case, the legal order in question would be illegitimate because the descriptive legitimacy requirement is not satisfied. Although it is entirely consistent to simply regard this legal order as illegitimate based on this conception of legitimacy, it is hard not to notice that if we assume the first two conditions as 'true', the third is 'false'. If the first true conditions are based on objective grounds which are assumed as true, which is why they are required in every evaluation of an object of legitimacy, the beliefs seem to be simply a falsity. Making normative legitimacy dependent on descriptive legitimacy would render normative legitimacy dependent on morals of a specific society in a specific time. 'Normative' is thus diffused in relativism. I will elaborate on relativism below. At this point, we can conclude that descriptive legitimacy could be a necessary condition of normative legitimacy but that is exclusively a matter of normative conception of legitimacy, which is a matter of substantive argument; as a matter of conceptual analysis, descriptive legitimacy is neither a necessary nor sufficient condition of normative legitimacy.

On the other hand, is normative legitimacy a necessary and/or sufficient condition for descriptive legitimacy? Again, the answer turns to the negative. Imagine the same example. In a legal order with a legitimate government, citizens believe that the government is illegitimate because the government officials are not religious enough. The normative legitimacy condition is satisfied, yet descriptive legitimacy does not

obtain. Therefore, normative legitimacy is not a necessary condition for descriptive legitimacy. Also, the normative legitimacy condition is satisfied, yet it does not guarantee that descriptive legitimacy obtains. Therefore, normative legitimacy is neither necessary nor sufficient condition for descriptive legitimacy. Although it is undoubtedly desirable for citizens to regard legitimate bodies, governments, actions and rules as legitimate and, *as a matter of fact*, descriptive legitimacy may usually (though not always) overlap with normative legitimacy, it is not the case the there is any implicational relationship (necessary or sufficient) or logical connection whatsoever between descriptive and normative legitimacy.

There is, however, a caveat here. In order for the distinction between perceived and normative legitimacy to be valid and there being no implicational relationship or logical connection whatsoever between these two concepts, it has to be the case that the normative legitimacy is indeed normative. It has to be the case that normatively speaking, a government, for example, is illegitimate when it exterminates members of its society in virtue of their religious beliefs, *regardless* of what people *believe* is legitimate or illegitimate. As we noticed above with a possible normative conception rendering normative legitimacy dependent on descriptive legitimacy, to the extent that normative legitimacy includes a *moral standard*, it has to be the case that the moral standard exists and is not relative. This claim excludes moral nihilism from the discussion of normative legitimacy.

2.3.2. Refuting Nihilism

Indeed, moral nihilism, the view that there are no objective moral facts, is not a view one can hold when discussing normative legitimacy. Moral nihilism is a meta-ethical view, so a few words on metaethics are in order. Although it may have been expected that the legitimacy discussion is about ethics – whether peace or human rights or democracy or this or that moral standard is the best standard-, conceptual analysis has led the discussion to a step logically prior to ethics, namely meta-ethics.

Meta-ethics is second order ethics because they make claims about moral theories.[42] Ethics or morals are theories about what is right and wrong, such as consequentialism and Kantianism. By contrast, meta-ethics do not tell us what is right and wrong, what is morally permissible, impermissible or obligatory, but they are theories about what moral statements mean. A moral statement, such as 'Killing for entertainment purposes is wrong.' has different meaning when assuming different meta-ethical theories.

More specifically, meta-ethics addresses two separate questions: 1. What state of mind are we in when we assert statements about right and wrong? 2. Are there mind-independent moral truths? These two questions invite for two different classifications of meta-ethical theories. As regards the first question, people disagree about what moral statements **intend** to express, beliefs or desires. Are moral statements even capable of being true or false? Can they have a truth value, or do they merely express an attitude? The opposing schools here are cognitivism and non-cognitivism or emotivism or expressivism. Cognitivism holds that moral statements do express beliefs and that they are apt for truth and falsity. Non-cognitivism holds that moral statements have no substantial truth conditions, i.e. they are not apt for truth and falsity, and that moral statements do not express states of mind which are beliefs, or which are cognitive in the way that beliefs are; rather they are expressing non-cognitive attitudes more similar to desires, approval or disapproval.

The classifications differ in terms of the second question, which is what interests us most in this discussion. The second question is whether there are objective moral truths out there in the world, in other words whether moral facts populate the universe of facts. The opposing schools here are objectivism and non-objectivism. According to moral objectivism, there are objective moral truths. The truth value of moral statements

[42] In philosophy, 'ethical theory' and 'moral theory' are used interchangeably, but in English 'ethics' and 'morals' are not used interchangeably. One reason for this is that 'ethics' is commonly used to refer to adherence to a code of conduct, as in 'business ethics' or 'medical ethics', which might prohibit an action that is not morally impermissible. For example, insider trading is a violation of business ethics, but it is hard to see how buying or selling stocks on information that one has and others do not is morally impermissible. It is contrary to medical ethics for a psychiatrist to have an intimate relationship with a patient, but it is hard to see how it is morally impermissible for two competent adults to have a consensual intimate relationship, provided they are not already committed to someone else. In English language, the term 'morals' also has a different connotation from 'ethics' in referring possibly to a list of traditional restrictions such as a prohibition against extramarital sex. The different uses of the terms 'ethics' and 'morals' in English language are irrelevant to this discussion, as the terms 'ethical theory' and 'moral theory' are used as in philosophy.

(true/false) is unchanged through space and time and independent of people's opinions or any other human attitudes.

Cognitivism and objectivism usually go together, but not necessarily so. The famous 'error theory' of Mackie for instance combines cognitivism with non-objectivism, arguing that whilst moral statements try to express truth (cognitivism), there is no truth out there to be expressed (non-objectivism). Moral statements are like statements about Santa Clause: they try to be true but since there is no truth out there, they are all false.

Non-objectivism negates objectivism. Thus, non-objectivism or moral nihilism holds that there are no objective moral facts. I will examine three moral nihilist theories, which are negated by normative legitimacy.

Error theory discussed above is a moral nihilist theory. Error theory holds that moral statements ascribe properties to states of affairs and these properties do not exist. It therefore implies that there are no objective moral facts. Remember that 'objective', as typically used, means 'attitude-independent'. Notably, one nihilistic alternative to error theory would be a crude kind of expressivism: there are no moral facts and moral statements merely express attitudes (other than belief) and do not make assertions. This view also negates the existence of objective moral facts, so it is a nihilist theory.

Another nihilist theory is individual relativism or subjectivism. According this theory, moral statements mean that the utterance is true according to the speaker, i.e. the speaker holds the opinion stated in the utterance. In other words, what is morally right or wrong for each one of us depends on what each person believes is morally right or wrong, i.e., right or wrong is *relative* to the individual. The moral facts are not objective; they may alter from person to person. For example, to claim 'It is wrong to kill for fun' means that the subject stating the claim believes that it is wrong to kill for fun.

Respectively, according to cultural relativism (or relativism or conventionalism), moral statements mean that the utterance is regarded as true by the culture in which the speaker belongs. In other words, what is morally right or wrong depends on what the society in question believes, i.e., morality depends on the conventions of the society we

are concerned with. The moral facts are not objective; they may alter from society to society. For example, to claim 'It is wrong to kill for fun' means that according to the culture of the speaker, it is wrong to kill for fun. Notably, relativism as a meta-ethical theory does not refer to the descriptive fact, which we would all agree with, that people's beliefs about morality differ from place to place and change through time; the point here is not the descriptive/sociological fact of what people believe, but whether there are objective moral facts or not, regardless of human attitudes.

Indeed, subjectivism and relativism are generally useful, but irrelevant to this discussion. These two theories can help us understand psychological reasons motivating moral statements. They prompts us to ask whether a moral statement that was made about a moral rule actually does have a fixed value as moral objectivism would maintain or if in real it is simply an opinion of what is right and wrong according to a certain individual or culture, which is very often the case as different cultures have different moral values, ranging from exceptions to the prohibition of killing to standing in line when waiting for the train (compare England with India). This theory, however, is irrelevant to the discussion as it addresses, much like perceived legitimacy, descriptive sociological questions pertaining to whether and why an individual or a culture hold certain views. In the more general context of ethics, subjectivism and relativism seem to be missing the point because moral disagreements are disagreements about what is right and wrong, not about whether a specific subject has made a specific claim, which is a matter of fact (in the ordinary use of the term 'fact', i.e. not a moral fact). Ethical disagreements are about whether it is wrong to kill for fun, not about whether an individual or a culture believe that it is wrong to kill for fun.

Having examined subjectivism and relativism, I will now discuss moral scepticism. This theory pertains to the epistemological question of accessing moral truths, not the ontological question of whether they exist. In other words, like expressivism, it pertains to the first question metaphysics tries to answer, - what state of mind we are in when we assert statements about right and wrong-, not the second – whether there are mind-independent moral truths. Therefore, moral scepticism could be or could not be nihilist. If I were defining 'moral scepticism', I might say it is the view that we cannot possibly *know* that any moral proposition is true or false. However, so stated, moral scepticism is consistent with the view that we can be *justified in believing* that moral propositions

are true or false. The issue concerns the truth conditions of 'know'. I can consistently hold that we do not know that we are not brains in a vat, yet claim that we are justified in not believing that we are. So, if moral scepticism is understood as a claim about knowledge and not justified belief, then perhaps we do not know moral propositions that we are justified in believing. So, moral scepticism as defined above is not a very threatening doctrine. For this reason, it might be better to characterize moral scepticism as the view that we cannot be justified in holding any moral beliefs. A downside of this characterization of course is that it seems absurd.

Regardless, whichever version of scepticism we assume, the theory could be nihilist or not nihilist. According to the first version, scepticism is the view that we cannot possibly know that any moral proposition is true or false. One can hold this claim and consistently hold the claim that there are objective moral facts or the claim that there are no objective moral facts. The distinction between ontology and epistemology is present. By the same token, one can claim that we cannot be justified in holding and moral beliefs whatsoever, regardless of whether there are objective moral facts or not, as moral nihilism maintains.

Difficulties of nihilist theories do not automatically prove moral objectivism. Not only the obvious problems we have seen pertain merely to subjectivism and relativism, not to error theory, but it is difficult to prove moral objectivism, given that it does not indicate the epistemological route for accessing any fixed truth values, assuming they exist. If there is no 'proof' of the existence of fixed truth values, how are we justified in understanding moral statements as anything more than mere opinions?

Notably, the objectivism vs non-objectivism debate lies outside the scope of this discussion, because a substantive moral argument is hereby *not* made. In the context of a normative conception of legitimacy, if a substantive moral argument was made, moral objectivism would perhaps ought to be somehow proven or at least examined, at least as a better alternative to nihilism. However, since in this discussion such an argument is not made (as the discussion attempts a conceptual analysis of legitimacy without advancing any normative conceptions of the concept), such a robust premise is not required.

Although this discussion will not serve as a battleground between objectivism and non-objectivism as it lies outside the scope of this discussion, a consistency argument is relevant. If moral nihilism is true, there is no room for discussing normative legitimacy, assuming that legitimacy includes some substantive, and more specifically moral criteria. The specific criteria of legitimacy to obtain, i.e. the necessary and sufficient conditions for the moral right to rule, are a matter of normative conception of legitimacy, not conceptual analysis. The claim that is made here is that it is inconsistent to hold moral nihilism on the one hand and the claim that legitimacy includes moral criteria on the other. One could, theoretically, be a moral nihilist and hold a conception of legitimacy which contains only procedural criteria, or one could reject moral nihilism and hold any conception of legitimacy. This claim is relevant only if it is the case that it is not conceptually necessary that legitimacy only includes procedural criteria. Is this the case?

2.3.3. Legitimacy: Substantive vs Procedural Dilemma?

It could be argued that legitimacy is entirely procedural. If so, it would only make sense for a distinction to be made between procedural and substantive legitimacy. In the former case, the necessary and sufficient conditions for legitimacy to obtain would be procedural and in the latter substantive.

Applbaum correctly argues that since the necessary and sufficient conditions for legitimacy to obtain is a matter of normative conception of legitimacy and not conceptual analysis, it is incorrect to maintain that as a matter of conceptual necessity, legitimacy is either only procedural or substantive.[43] Indeed, as a matter of conceptual necessity, legitimacy can include both procedural and substantive criteria. Arguing to the contrary would be arguing for a specific normative conception of legitimacy, which in the scheme presented in this discussion would belong to Tier 3.

Instead of dwelling on the mundane task of repeating Applbaum's excellent scholarly work explaining in further detail why legitimacy, as a matter of conceptual necessity, can be both procedural and substantive and best reject entirely procedural conceptions

[43] Applbaum, (n 16), 31.

of legitimacy,[44] I will limit myself to certain observations. These observations easily indicate that legitimacy is more commonly assumed to be both procedural and substantive. The fact that legitimacy is assumed to include both procedural and substantive criteria does not mean that the concept necessarily has such criteria. Besides, as stated above, the necessary and sufficient conditions for legitimacy to obtain are a matter of normative conception, not conceptual analysis. However, the observation that legitimacy is often assumed to be not only procedural but also substantive, brings out the importance of consistency in the discussion of legitimacy: if we rush to claim that legitimacy is only procedural, yet we catch ourselves maintaining that an object is illegitimate based on substantive grounds, then we are rendering ourselves inconsistent.

Was the Nazi regime legitimate or illegitimate? Adolph Hitler was democratically elected, so procedure was followed. Indeed, Hitler did violate certain procedural rules after his election to power, but is this what the Nazi regime is regarded as having been illegitimate for or the immorality of genocide (substantive)? Had the Nazis followed strictly all procedure but had committed the same or even greater genocide, would the proponents of procedural legitimacy regard the Nazis as legitimate regime? If legitimacy is entirely procedural, a Nazi type regime which ticks all the boxes when it comes to procedure but establishes and regulates genocide would be legitimate. Would then the concept of legitimacy, thus construed, carry any significant weight?

Next, if legitimacy is all about procedure, how does it differ from legality and legal validity? If the 18th century US legal order was legal/legally valid because it was effective and enforcing its constitution and satisfying procedural criteria, how would legitimacy, determined entirely by procedural criteria, differ from legality or legal validity? If a norm has been established according to the proper procedures provided by a given legal order, it is legally valid. If legitimacy is entirely procedural, then the law, regardless of substance, would be legitimate exclusively because it is legally valid. Legality/legal validity would then seem to fully overlap with legitimacy, rendering legitimacy a redundant concept. Interestingly enough, according to the Kosovo report, legality s exactly what legitimacy is typically contrasted to, referring to the "gap

[44] Ibid, 30-37.

between legality and legitimacy"[45] and clarifying that "The Commission's answer has been that the intervention was legitimate, but not legal, given existing international law."[46]

Finally, the US/UK attack on Kosovo reminds us that legitimacy is widely understood as including substantive criteria. This attack was an instance where the concept of legitimacy bore an extremely important role, i.e. the role of justification of an illegal attack on a sovereign state. This is an instance where legitimacy was used under careful consideration; an instance where the world relied on this very concept to determine whether an illegal attack which was to escalate force and increase the number of deaths was to take place. Legitimacy, in this important instance, obviously included substantive criteria: "It was legitimate because it was unavoidable: diplomatic options had been exhausted, and two sides were bent on a conflict which threatened to wreak humanitarian catastrophe and generate instability through the Balkan peninsula."[47] Attacking illegally to prevent humanitarian catastrophe and maintain stability, as the attacked was thought to have intended, is not a procedural, but a substantive matter (preventing humanitarian catastrophe seems clearly moral).[48] In this instance where

[45] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000), 291.
[46] Ibid, 289.
[47] Ibid.
[48] It has to be noted that, on the one hand, *an* intervention in order to avoid a humanitarian catastrophe and on the other hand, *the* actual intervention, i.e. the specific US/UK attack, after the Kosovo report, *as* it happened, are two different objects of legitimacy. The legitimacy or illegitimacy of the one object does not entail legitimacy or illegitimacy of the other. The former is legitimate as it envisages an attack that will merely prevent, or rather say terminate, a humanitarian catastrophe. Determination of legitimacy of the actual attack would have to consider facts such as that the appropriate means to protect innocent civilians was land forces which can discriminate between combatants and civilians, whereas aerial bombings indiscriminately kill combatants and civilians and 'Aerial strikes are not effective for protecting people on the ground who are likely to suffer additional discrimination and abuse because of the bombing' (see Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' (2000) 49 ICLQ 926, 922); although the humanitarian catastrophe attributable to Yugoslav military forces resulted to a standard estimate of 2000 deaths and hundreds of thousands of refugees (Noam Chomsky, 'The Current Bombings: Behind the Rhetoric' (March 1999) < https://chomsky.info/199903__/> accessed 23 April 2019 (under (2) How do these or other considerations apply in the case of Kosovo?), surprisingly, during the first 60 days of the 7 000 attacks (on more than 500 targets) NATO had killed as many as 1500 civilians, "this war, supposedly in defense of human rights, has led to war crimes being committed by NATO and a civilian casualty rate that is at least three times greater than the casualty rate of the 'intolerable' violations of human rights that NATO was supposedly acting to protect", the result of the attacks provoking wider Serbian offensive against ethnic Albanians was foreseen by military and CIA, yet it was ignored, whereas diplomatic efforts for settlement had not been exhausted, "It is certainly hypocritical for those who propose a take-it-or-leave-it deal [which would have rendered Yugoslav and Serbian sovereignty in Kosovo largely fictive] to complain when the allegedly obstinate party actually offered a counterproposal", "The Wall Street Journal reported, on April 27, that NATO had decided to attack 'political, rather than just military, targets in Serbia.', and "That the NATO planned from the outset

legitimacy seems to have mattered the most, it is substantive criteria that did the heavy lifting.[49] The Kosovo report is an excellent exemplification of the contrast between the concepts of legality and legitimacy.

Indeed, if legitimacy is, as often stated, the *moral* right to rule, it includes substantive criteria as well, since morality is a substantive, or at a least partly substantive criterion. The ones who wish to argue for a normative conception of legitimacy which includes only procedural criteria would have a lot of work to do separating legitimacy from legality (making sure legitimacy does not collapse to legality), and also explaining, if possible, what other concept than legitimacy was actually deployed by the word 'legitimacy' in the case of the US/UK attack to Kosovo where 'legitimacy' was used with substantive considerations.

So far, certain claims have been made in terms of legitimacy in Tier 2:

1. Descriptive or sociological or perceived legitimacy is distinct from normative legitimacy. These two concepts are not logically connected: as a matter of conceptual analysis, none of the two is a necessary or sufficient condition for the other to obtain; they are thus clearly distinct. Any logical connection between the two can only be argued in the context of a normative conception of legitimacy.
2. If legitimacy is at least partly substantive and that includes morality, discussion of normative legitimacy is incompatible with nihilism or relativism. Thus, if one

---

to hit civilian targets was made clear", regardless of the fact that "Depriving a civilian population of water is a textbook example of a violation of international humanitarian law", "the 'humanitarian intervention' in Kosovo has resulted in flagrant violations of international law and the UN Charter by NATO countries; it has turned what had been the brutal repression of a brutal armed uprising into a humanitarian catastrophe, and produced the first massive bombings of a European country since World War II, bombings that were aimed mainly at civilian targets" in Robert Hayden, 'Humanitarian Hypocrisy' (1999) 8 East European Constitutional Review 91, 91-94 (see entire article for Figures on war activities, costs, losses and overall view of the attack); the NATO Treaty did not provide authority to act for humanitarian purposes and NATO did not attempt to use the Uniting for Peace Procedures of the General Assembly (Kosovo: House of Commons Foreign Affairs Committee 4th Report, June 2000, (2000) 49 ICLQ 876-877, 877); not every diplomatic effort for a settlement was exhausted and that the primary justification for the bombing of Yugoslavia was always the imposition of the NATO plans for the future of Kosovo (Ian Brownlie and CJ Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 29 ICLQ 878, 879 and 896-904).

[49] Applbaum shares the understanding that the Kosovo Report grounds legitimacy on moral criteria: 'To defeat the Kosovo Report, one has to provide a moral argument.' in Arthur Isak Applbaum, (n 27), 80. At this point, I make no claims pertaining to whether the US/UK attack on Kosovo was legitimate or illegitimate.

holds nihilism or relativism as true, there is no room for discussing normative legitimacy, assuming that legitimacy includes some substantive, and more specifically moral criteria.

3. As a matter of conceptual analysis, it is not necessary that legitimacy is entirely procedural and there is room for legitimacy to be at least partly substantive. Any belief that legitimacy is entirely procedural is a matter of normative conception of the concept which does not derive from conceptual necessity.

2.3.4. The Core of Legitimacy: The Three Views

Having established these three claims, the discussion within Tier 2 can continue. In Tier 1, legitimacy in its most abstract form is a vague standard of properness. How more specific than vague properness does legitimacy become in Tier 2, where the concept is linked with the four object types of legal form? Legitimacy, the moral right to rule, is what kind of moral right? Three Hohfeldian answers come into play. Legitimacy can be understood as a claim right, as a liberty right and as a moral power.

I will now explain the distinction between claim and liberty right. In his highly influential work *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Legal Essays*, American jurist Wesley Newcomb Hohfeld made a seminal distinction between two senses of rights, namely claim rights or rights proper) and liberty rights (or privileges). Liberty rights and claim rights are the inverse of one another: X has a liberty right permitting him to do something only if there is no other person Y who has a claim right forbidding X to doing so, or, which is the same, if X does not have a duty to refrain from doing so. Conversely, if X has a claim right against Y, that other person's liberty is thus limited and Y has a correlative duty. This derives from the principle that a person is permitted to do all and only the things he is not under a duty to refrain from, and obligated to do all and only the things he is not permitted to refrain from. A person's *liberty right to x* consists in his freedom to do or have *x*, while a person's *claim right to x* consists in an obligation on others to allow or enable him to do or have *x*. For example, to assert a *liberty right* to free speech is to assert that I have permission to speak freely. This means that I am not doing anything wrong by speaking freely, that I do not have a duty not to speak freely. However, this liberty right does not in itself entail that others are obligated to help me communicate the things I wish to say,

or even that they would be wrong in preventing me from speaking freely. To say these things would be to assert a *claim right* to free speech; to assert that others are obligated to refrain (i.e. prohibited) from preventing me from speaking freely (that is, that it would be wrong for them to do so) or even perhaps obliged to aid my efforts at communication (that is, it would be wrong for them to refuse such aid). Conversely, such claim rights do not entail liberty rights. As we follow the Hohfeldian framework, it is important to recognize that it is analytically purificatory and definitional, not empirical or substantive. This analytic scheme is a framework of deontic logic, with positions connected by purely logical relations of entailment and negation. It does not attempt to prescribe or recount the substance and the distribution of actual entitlements. This framework is therefore not susceptible to moral objections or empirical refutation.[50]

2.3.4.1. Legitimacy as a Claim Right

Legitimacy was first understood as a moral claim right. In Crito, one of his earliest dialogues, Plato, the first to treat the question of legitimacy, understands legitimacy as what has later become the dominant, at least historically speaking, view of legitimacy, which is that legitimate political authority entails political obligations.[51] Thus, Socrates finds himself having the moral obligation to abide by a decision of his fellow Athenians, not because he regards the decision correct, but because it is a decision taken in accordance with the laws of a legitimate state. The object of legitimacy, here the legal order of Athens, is presented as a bearer of the moral claim right demanding obedience towards the subjects of legitimacy, the ones legitimacy is directed towards, who are the subjects of the legal order, i.e. all the people under the governance of the city-state of Athens, Socrates included.

Conception of legitimacy as a claim right seems to still be the standard view.

[50] Mathew Kramer, 'Rights Without Trimmings' in Kramer M, Simmonds N E and Steiner H, *A Debate Over Rights: Philosophical Enquiries* (Oxford Scholarship Online 2010) DOI: 10.1093/acprof:oso/9780198298991.001.0001 22-23.

[51] In the Republic (Book X), Plato examines legitimacy in a very different sense, i.e. in the sense of 'qualifications to rule', i.e. those titles possession of which justifies one's rule (e.g. the title of wealth, the title of wisdom, and so forth). It is thus important to note that I am not referring to all writings of Plato, but to Crito in particular.

> The standard view is that legitimacy entails two other normative relations: the moral obligation of those legitimately ruled by the ruler to obey, and the moral immunity of the ruler from coercive interference in the exercise and enforcement of legitimate rule. On this view, it is incoherent to hold that an authority is legitimate, but that those subject to the authority are not morally obligated to comply with its commands, or that others are not morally disabled from stopping the legitimate authority from exercising its legitimate powers. To think that legitimate commands do not necessarily obligate is like thinking that parenthood does not necessitate children.
>
> To take one important proponent of this view, John Simmons claims that 'state legitimacy is the logical correlate of various obligations, including subjects' political obligations.'[52] If, as Simmons holds, a subject's consent or something like it is a necessary condition for a state to be legitimate with respect to that subject, then indeed a tight (but still, not airtight) connection between legitimacy and obligation would follow. For ordinarily, to what would the subject consent, if not to political obligation? But the consent of the governed is not itself a conceptual requirement of legitimacy: the view that a ruler is legitimate if and only if he has been anointed by the one true god is a mistake, but not a logical contradiction. So Simmons's view should be understood as a normative conception of legitimacy. Simmons thinks that rival conceptions of what makes a particular state legitimate with respect to particular subjects suffer from not being sufficiently distinguishable from accounts of what justifies the state—that is, accounts of what must be the case for the exercise of coercion by the state to be morally permissible. As will be explained shortly, I agree that legitimate authority is not merely justified coercion, and Simmons surely is correct that a complete account of legitimacy must connect particular subjects to particular authorities. But it does not follow that consent to obligation is the only possible way to make this connection.[53]

An explanation is in place. Indeed, legitimacy as claim right means not only that the object of legitimacy has the right to exist, e.g. a legitimate legal order/system being in place, a legitimate norm being in place, a legitimate actor acting in accordance with its rules, etc.,[54] but also that that there is correlative moral duty to obey. Absence of that duty entails inconsistency, as Applbaum notes, because this moral duty is the necessary condition for a right to be a claim right; claim right necessitates the correlative moral duty to obey just like parenthood necessitates children. How is this moral duty accounted for? In other words, what makes one believe that there is such a moral duty? How does one account for the move from legitimacy entailing merely the right of the legitimate object to exist to adding the moral obligation to obey? Proponents of this

[52] See A. John Simmons, 'Justification and Legitimacy' (1999) 109 Ethics 739, 746.
[53] Applbaum, (n 16), 49.
[54] How each view is matched with each object type will be discussed towards the end of the discussion of each view.

view would probably claim that this obligation just *is* the essence of the claim right. Although this is true, it merely pushes the question one step further: now we ought to ask, what is it that makes an object legitimate so that apart from the right of the object to exist, there is also a correlative duty of its subjects to obey? We can merely discuss the object of legitimacy and examine whether it has the right to exist. But when entailing that there is also a correlative obligation of the subject of legitimacy to obey, there has to be an additional justification pertaining to the subjects, which links the subjects of legitimacy to the object of legitimacy, and explains to us how it is that just by the object of legitimacy being legitimate, the subjects of legitimacy have a correlative duty to obey. Simmonds assumes consent. Consent, however, is not a necessary component of the concept of legitimacy. One could argue that it is not consent that renders a government or legal order legitimate, but the extent to which the government or legal order reflects the divine law of the one true god. As Applbaum correctly stated, 'the view that a ruler is legitimate if and only if he has been anointed by the one true god is a mistake, but not a logical contradiction.' Any link that would connect the object of legitimacy with the subject of legitimacy in a way that adds to the concept of legitimacy the correlative duty of obedience would consist of a component which is not a conceptual requirement of legitimacy, whether it is consent, a true god, democracy, or protection of human rights or anything else. These components are not requirements of the concept of legitimacy, but they are necessary and/or sufficient conditions for legitimacy to obtain, in other words requirements of conceptions of the concept of legitimacy. 'So Simmons's view should be understood as a normative conception of legitimacy.' Of course, as Applbaum also notices, it is correct that an account of legitimacy 'must connect particular subjects to particular authorities. But it does not follow that consent to obligation is the only possible way to make this connection.' What other possible ways are there? This will be explored further on.

More recently, John Tasioulas also assumes that legitimacy is a claim right. In particular, he claims that since legitimacy is the moral right to rule and 'rights ground duties', it is entailed that the moral right to rule entails the duty to obey. In particular, he

states: "…the claim to impose duties belongs to the core or focal sense of legitimacy; indeed, so much is implied by speaking of a 'right' to rule, since rights ground duties."[55]

Like Tasioulas, Christopher Thomas, seems to assume that legitimacy is a claim right, though perhaps less obviously. As stated above, in Tier 2 where legitimacy is relevant to law, the objects of legitimacy belong to four object types of legal form, namely actor, actions, individual laws and legal orders/systems. Objects of legitimacy answer the question: what could be legitimate? In maintaining that there are not only objects of legitimacy, but also *subjects* to legitimacy, which by definition have to obey/submit to legitimacy, he is construing legitimacy, the moral right to rule, as a claim right. In particular, Christopher Thomas maintains that legitimacy assumes "a subject who should submit to or support the legitimate object."[56] He holds that subjects of legitimacy could, for instance, "be citizens of a state, people in a state's territory or adherents of a particular region."[57] To be clear, every object of legitimacy will refer to certain subjects. The additional claim that Christopher Thomas is assuming is that the subjects have the moral duty to obey. But how could this be? The idea here is that when discussing the legitimacy of an object (legal order, law, action or actor), legitimacy *assumes* that there are subjects who should submit to or support that legal order, law, action or actor. The verb 'assumes' here manifests an unproven logical claim, in other words a logical connection which is not entailed: to say that a legal order or legal norm or action or actor is legitimate necessarily entails that subjects ought to submit to it (or support it), means that not only there are moral reasons for that object to exist (for the legal order to rule, or the state to rule or the action to take place or the legal norm to regulate), but also that other entities (the so-called subjects) have moral obligation to obey (submit to it). This claim is assumed as a correlative to legitimacy; i.e. legitimacy, the moral right to rule, is understood as a claim right.

How would the understanding of legitimacy as a claim right match with all the four objects of legitimacy? An action, such as an attack, being legitimate would entail that the target of the invasion has the moral obligation to not resist. (The other normative relation as stated above would be that invaders have moral immunity, so third parties

[55] John Tasioulas, 'The Legitimacy of International Law,' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), 98 note 3.
[56] Ibid, 747.
[57] Ibid.

are morally disabled from intervening). A norm, such as the international customary norm to self-defence, being legitimate would entail that the entities subjected to the specific norm, such as states, have the moral obligation to obey the norm. (The other normative relation would be that states which defend themselves enjoy immunity and third states are morally disabled from preventing a state to defend itself). An actor, such as the UNSC, being legitimate would entail that, within its sphere of competence, the entities, such as states, subjected to its decisions and resolutions have moral obligation to obey them. (The other normative relation would be that the actors, such as the UNSC, enjoy moral immunity and third parties are morally disabled from preventing the actor when the latter is acting within its sphere of competence). Legal orders or legal systems, such as domestic legal orders or the international legal order, being legitimate would entail that the entities subjected to that legal order have a moral obligation to obey it. This moral obligation is general, i.e. it is a moral obligation to obey all the laws and orders of that legal order or legal system, decisions of courts and resolutions of the UNSC in the international legal order etc.[58] (The other normative relation would be that the rulers enjoy immunity and third parties are morally disabled from stopping the legitimate authorities from exercising their legitimate powers).

2.3.4.2. Legitimacy as a Liberty Right

Legitimacy can also be understood as a liberty right (or 'liberty' or 'privilege' or 'justification-right'). As a liberty right, legitimacy does not entail any obligations towards its subjects. To understand freedom of speech as a liberty right is to assert that bearers of this right do nothing wrong by speaking freely. But this liberty right does not in itself entail that others are obligated to help communicate what the bearer of the right wishes to say, or even that they would be wrong from preventing the bearers of the right to speak freely; liberty rights entail no obligations. Understanding legitimacy as a liberty right then entails no obligation to obey.[59]

---

[58] It could be argued, perhaps more sensibly, that such a moral obligation is best construed as a presumption of moral obligation, instead of a moral obligation itself. That is to say, although in certain cases there could be moral right or even moral obligation to disobey, in principle, there is a moral presumption in favour of obeying the laws and commands of the legal order or legal system. In any case, this does not affect this part of the discussion.

[59] As Applbaum states, this understanding of legitimacy is held by Landenson - see Robert Ladenson, 'In Defense of a Hobbesian Conception of Law' (1980) 9 Philosophy & Public Affairs 134, 137-139 (where he concludes that 'The right to rule is such a justification-right.' in p. 139) which justifies Applbaum in distinguishing his 'power' account from Landneson's 'liberty right' (or 'privilege' or 'justification-right'), see Applbaum, (n 16), 56-58.

Christopher Wellman very well understands how it is that legitimacy is a liberty right and distinct from political obligation: "It is crucial to notice that political legitimacy is distinct from political obligation; the former is about what a state is permitted to do, and the latter concerns what a citizen is obligated to do. Although I believe these two are related, clearly they are not identical. In my view, political legitimacy is necessary but not sufficient for political obligation."[60]

> Political theorists often presume that the question of what justifies the state's coercion is merely the flip side of the issue of what grounds the citizen's obligation to obey the state. This conclusion follows from mistaking the correlative of a state's moral right to coerce as a citizen's moral duty to obey, but the true correlative of the former is merely a citizen's lack of right to not be coerced. To emphasize: Political legitimacy entails only a moral right to create *legally* binding rules, not a moral right to create *morally* binding rules. The latter entails corresponding moral duties, but the former need not; it implies at most only legal duties. The supposed existence of moral duties involves an additional (typically unrecognized) assumption that there is a moral duty to obey just law.[61]

The question whether there is moral duty to obey just law is a separate question which is not addressed by legitimacy. Therefore, legitimacy does not get us all the way to moral duty to obey, so legitimacy is not a claim right. A separate argument is needed in order to establish the additional claim that there is moral duty to obey. The burden of proof of this claim lies on the supporters of legitimacy as a claim right who seem to be assuming what they ought to be proving. This claim can, off course, be established by a normative account of legitimacy, for which a substantive moral argument would be required. Such a claim is not, however, substantiated by conceptual analysis. Applbaum is correct to point out that:

> It is a virtue in conceptual analysis to seek the least restrictive specification of a concept that is still useful and fruitful, because if we do not we risk making two mistakes. The first is to misdescribe a genuine disagreement as a semantic misunderstanding. The second is to dismiss rival moral arguments too quickly as logical mistakes. In this case, the dismissal indeed is too quick. If the exercise of legitimate authority creates moral obligation,

[60] Christopher H. Wellman, 'Liberalism, Samaritanism, and Political Legitimacy' (1996) 25 Philosophy and Public Affairs 211, 212.
[61] Ibid, note 1.

> this is so for moral reasons. If legitimate authorities have immunity, it is not an analytic truth.[62]

The least restrictive specification of the concept of legitimacy is clearly that legitimacy does not include a moral obligation to obey. If we do not follow the least restrictive specification of the concept, we risk misdescribing a genuine disagreement as a semantic misunderstanding. Semantic misunderstandings arise when people give different meanings to the same words. Thus, two people may disagree about whether an object of legitimacy creates moral obligation to obey. If we construe legitimacy as a claim right and include moral obligation to obey in the concept of legitimacy, then the disagreement regarding whether there is an obligation to obey may seem like a semantic misunderstanding: the speaker who uses the concept of legitimacy without entailing moral obligation to obey is just using the word/concept 'legitimacy' with the wrong meaning. However, this misunderstanding is misdescribed because whether there is a moral obligation to obey is a matter of substantive moral argument. Therefore, the disagreement about whether the object of legitimacy entails obligation to obey is not a semantic misunderstanding but a genuine disagreement. The second is to dismiss rival moral arguments too quickly as logical mistakes. Assume that we construe legitimacy is a claim right and includes moral obligation to obey. This entails that legitimate authorities have immunity. A rival moral argument according to which legitimate authorities do not have immunity would be then dismissed as a logical error. This dismissal is false, it is too quick, because if legitimate authorities have immunity, it is not an analytic truth, but a claim that has to be supported by substantive moral argument.

How would the understanding of legitimacy as a liberty right match with all the four objects of legitimacy? An action, such as an invasion, being legitimate would entail that the invaders have the freedom to invade, but the target of the invasion, e.g. targeted state, has no moral obligations in relation to the invasion, so self-defence would in that regard be morally permissible. A norm, such as the international customary norm of prohibition of piracy, being legitimate would entail that the entities subjected to the specific norm, pirates and states, have no moral obligation to obey this legal norm just because it is a legal norm. (There may be a moral obligation to not perform piracy if it is

[62] Applbaum, (n 12), 218-219.

inherently immoral, but that is independent of the international legal norm being a liberty right). An actor, such as the UNSC, being legitimate would entail that entities the decisions and actions the UNSC refer to have no moral obligation to obey. A domestic or the international legal order being legitimate would entail that the entities subjected to that legal order do not have a moral obligation to obey. There is thus no general moral presumption to obey the laws, orders, decisions and commands of the legal order in question. If legitimacy is a liberty right, substantive moral argument is needed for the subjects of legitimacy to have moral duty to obey.

2.3.4.3. Legitimacy as a Moral Power

Finally, legitimacy can be understood as a moral power. Apart from claim rights and liberty rights, Hohfeld's analysis included two other types of right: powers and immunities, which refer to second-order liberty rights and claim rights respectively. Powers are second-order liberty rights, i.e. liberty rights regarding the modification of first order rights. A **power** holder can modify, e.g. expand or reduce, his own entitlements or the entitlements held by some other person(s). By contrast, a **liability** bearer is exposed to the exercise of a power; the entitlements of the liability-bearer are open to being amplified or diminished or shifted in certain ways. Thus, a power consists in one's ability to effect changes in legal or moral relations, while a liability consists in one's being unshielded from the bringing about of changes by the exertion of a power.[63] For example, the US Congress has certain powers to modify some of US citizens' legal rights, inasmuch as it can impose or remove legal duties. (Immunities, conversely, are claim rights regarding the modification of first-order rights).

[63] Mathew Kramer, 'Rights Without Trimmings' in Kramer M, Simmonds N E and Steiner H, *A Debate Over Rights: Philosophical Enquiries* (Oxford Scholarship Online 2010) DOI: 10.1093/acprof:oso/9780198298991.001.0001 20-21.

FIGURE 1. HOHFELDIAN LEGAL RELATIONSHIPS

Vertical pairs are correlatives. Diagonal pairs are opposites.

RIGHT	PRIVILEGE	POWER	IMMUNITY
DUTY	NO-RIGHT	LIABILITY	DISABILITY

(After Hohfeld, *Fundamental Legal Conceptions.*)

Applbaum correctly understands that legitimacy is not a first order right, claim right or liberty, but a kind of moral power. In particular, it is the moral power to create and enforce *non-moral*, or at least not yet moral, prescriptions and facts. Thus, a legitimate authority for instance has the moral power to author legal, institutional, or conventional rights and duties, powers and liabilities (thus an kind of rights), which change the legal institutional, and conventional situation or status of subjects. But in what way does the exercise of this moral power change the *moral* situation or status of the subject? In accordance with Hohfeld's framework, when A exercises a moral power toward B, and thereby imposes upon B an institutional duty, B has a correlative moral *liability*. Liability is B being subject to morally justified enforcement. However, neither a moral liability nor an institutional duty is a moral duty. The fact that B is now subject to moral liability, justified enforcement, is a change of the normative situation of the subject, which is exactly what *legitimate* authority does, exactly because legitimacy is a moral power, and moral power changes normative relationships. Although it could be the case in the context of a substantive conception), it is not *conceptually* necessary that, if A exercises legitimate authority in imposing upon B an institutional duty, B has a moral duty to obey.

A few clarifications are in place. It is obviously tautologically the case that if A succeeds in imposing upon B an institutional duty, B has an institutional duty to comply. Applbaum does not claim that valid law simply is a declaration of the ruler's will backed by threat, morally justified or not. Clearly, valid law generates valid legal obligations among other legal advantages and disadvantages, such as claim rights. The point at issue is whether valid legal obligations are of necessity *moral* obligations. Applbaum's power-liability account, which the conceptual analysis of this discussion follows, says no: whether hypothetical imperatives are also moral imperatives is a conceptually open question to be settled by substantive moral argument in light of morally relevant empirical circumstances.

Finally, Applbaum illustrates how we are to understand a moral liability that is not yet a moral duty. As per Hohfeld, the opposite of a liability is an immunity: thus, the subject of legitimate authority has no moral immunity against the loss of legal rights and the subsequent detrimental exercise of privileges by others, or the imposition of legal duties and their enforcement, and this limits the sort of justified complaints the subject can make. When such legal privileges are granted and exercised by others, or when legal duties are imposed and enforced, the subject can complain that the law is mistaken, stupid, or unfair, but he cannot

justifiably complain that the law is an *unauthorized abuse of power*. He can complain that he has been wronged in one way, but not in another: if legitimate, this is the sort of mistake about right and wrong that is the authority's to make. Indeed, a legitimate law need not be a just law, as a conceptual matter.[64]

One could wonder whether the distinction between legitimate object and just object (such as law) is in tension with legitimacy correctly understood by Applbaum as not only procedural but also substantive, since 'just' is substantive. "Normative argument, not conceptual analysis, is required to determine whether the content of the concept, the necessary and sufficient conditions for having legitimacy, make reference solely to pedigree and procedure, or also include substantive criteria."[65] As a matter of conceptual analysis, legitimacy is not content-independent. Indeed, as a matter of conceptual analysis, substantive criteria are not excluded from legitimacy. So, although legitimate law *need not* be just law (as a conceptual matter), it *could be* so (as a matter of normative conception).

Therefore, since as a matter of conceptual analysis, legitimacy being a moral power entails absence of complain about injustice, the content-independent trait is qualified. As a matter of conceptual analysis, legitimacy is not content-independent on the one hand, but on the other hand an important part of the content lies outside the scope of legitimacy. Whether a law is just or unjust pertains to the content of the law. As stated above, the 'legitimacy as a moral power' account 'limits the sort of justified complaints the subject can make. When such legal privileges are granted and exercised by others, or when legal duties are imposed and enforced, the subject can complain that the law is mistaken, stupid, or unfair, but he cannot justifiably complain that the law is an unauthorized abuse of power.' The law being authorized or unauthorized is a procedural matter, not substantive (like 'mistaken, stupid, or unfair'). It thus seems that the limitation of the complaints of the subject is in tension with the legitimacy as moral power view being not entirely substantive. The only response seems to be that other substantive complaints can be presented as complaints grounded on legitimacy, though they are not complaints of justice. It makes one wonder though, what these could be. It seems to me that such substantive grounds are avoided by Applbaum because they

[64] Applbaum, (n 16), 86; Applbaum, (n 16), 53-54.
[65] Applbaum, (n 16), 86; Applbaum, (n 16), 30.

derive from the normative account of legitimacy which is not our issue here, not from the conceptual analysis of legitimacy and the understanding of it as a moral power.

How would the understanding of legitimacy as a moral power match with all the four objects of legitimacy? An action, such as an invasion, being legitimate, entails that the invaded state has moral liability, i.e. the invaded state is subject to morally justified enforcement. Liability does not entail moral duty to comply. If the invasion is legally valid, the invaded state has a legal obligation (institutional duty) to comply but not necessarily moral duty. Such a moral duty is to be settled by substantive moral argument in the light of morally relevant empirical circumstances. The invaded state, the subject of legitimacy, has no moral immunity against the loss of legal rights and the detrimental exercise of privilege by others, or the imposition of legal duties and their enforcement, and this limits the sort of justified complaints the subject can make. In the absence of that, there is no difference between legitimacy of an action, such as an invasion, being a (first order) liberty right, or a second order liberty right, i.e. moral power.

A norm, such as the international customary norm of prohibition of piracy, being legitimate would entail that the entities subjected to the specific norm, pirates and states, are subject to morally justified enforcement, i.e. they have moral liability, without that entailing moral obligation to obey this legal norm just because it is a legal norm. Such a moral obligation to not perform piracy can be established by substantive moral argument. The subjects of the legal norm have no moral immunity against the loss of legal rights and the detrimental exercise of privilege by others, or the imposition of legal duties and their enforcement, and this limits the sort of justified complaints the subject can make. In the absence of that, there would be no difference between legitimacy of a legal norm being a (first order) liberty right, or a second order liberty right, i.e. moral power.

An actor, such as the UNSC, being legitimate would entail that entities subjected to its actions and decisions, mainly states, are subject to morally justified enforcement, i.e. they have moral liability, without that that entailing moral obligation to obey the actions and decisions of the UNSC. Moral duty of subjects to comply with the object of legitimacy, such as the UNSC, can be settled with substantive moral argument. The

subjects of legitimacy, mainly states, have no moral immunity against the loss of legal rights and the detrimental exercise of privilege by others, or the imposition of legal duties and their enforcement, and this limits the sort of justified complaints the subjects can make. Thus, if the UNSC orders the use of force against a state in accordance with Chapter VII of the UN Charter, the attacked state may not have moral obligation to obey but it has moral liability, i.e. no moral immunity against the loss of the legal right to not be attacked and subsequent exercise of actions on behalf of other states which support the attack. The kind of justifications the attacked state can make are limited: the attacked state can complain that the decision was mistaken or unfair, but not unauthorized abuse of power. In the absence of that, there is no difference between legitimacy of the UNSC being a (first order) liberty right, or a second order liberty right, i.e. moral power.

Finally, a domestic or the international legal order being legitimate would entail that the entities subjected to the legal order in question have moral liability. This means they are subject to morally justified enforcement, including enforcement of all the laws, acts (such as acts of executive function in domestic legal orders), orders (such as court orders) and commands (such as commands from law enforcement mechanisms) of that legal order. Yet, the entities subjected to the legal order in question do not have a (general) moral duty to obey. Such a moral duty can only be settled with a substantive moral argument. The subjects of legitimacy, whether they are states, international organizations, legal or physical persons, have moral immunity against the loss of legal rights and the detrimental exercise of privilege by others, or the imposition of legal duties and their enforcement, and this limits the sort of justified complaints the subjects can make. Subjects can complain that the laws, decisions etc. are mistaken or unfair but not unauthorized abuse of power. In the absence of that, there is no difference between legitimacy of a legal order being a (first order) liberty right, or a second order liberty right, i.e. moral power.

It has become obvious that for the view of legitimacy as moral power, the power-liability view as Applbaum calls it, to be distinguished from both the view of legitimacy as liberty right, the appropriate examples must be analysed. In many cases these two views will overlap and have the same entailments, such as no moral duty to obey. Only

in examples where the entailments of the two views differ can one see the difference between the two views.

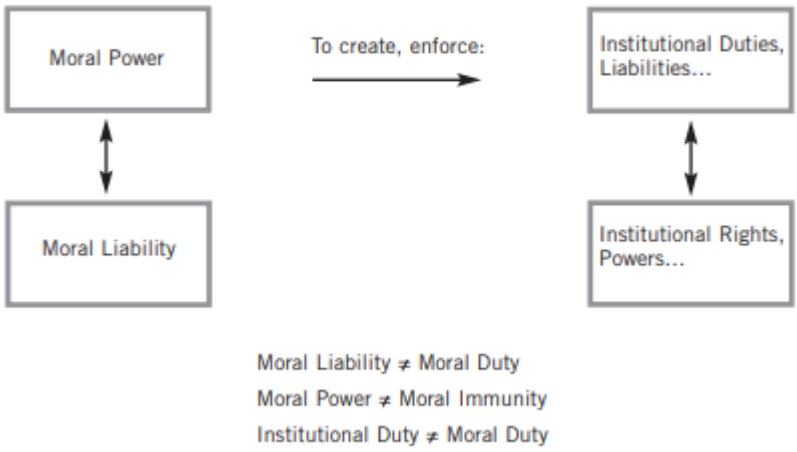
Separating his view from the legitimacy as liberty right view, Applbaum writes:

> the creation of a legal right or duty by a legal power can change the normative situation of a subject of the legal right or duty by changing his moral rights and privileges, powers, and immunities even when no moral duty to obey the legal power has been generated. Having the power to change these moral statuses is moral power. Although all such moral powers can also be said to be moral privileges to exercise legal powers—hence the temptation toward reduction—not all moral privileges to exercise legal powers are moral powers, because the exercise of legal power does not always affect moral rights and privileges. The difference matters, because we should expect that the criteria for having a morally justified privilege to exercise an institutional power that does not affect moral rights and privileges (altering the rules of Quidditch) are less demanding than the criteria for having a moral power that operates via institutional powers (altering the rules of private property). Powers and privileges are not redundant ideas, and the subsequent streamlining of Hohfeld's scheme by the deontic logicians provided no illumination in legal and political philosophy. Although one can attempt to circumvent using the idea of a moral power by reducing all such situations to moral privileges to exercise institutional power, an important distinction would be lost.[66]

One must be careful then to notice when, assuming legitimacy as moral power, exercise of moral power affects moral rights and privileges. If the exercise of moral power (legitimacy) does not affect moral rights and privileges, then in that instance moral power will essentially overlap with liberty right. In other words, in that instance, there will be no difference between understanding legitimacy as first order liberty right and legitimacy as second order right. However, absence of a difference in some cases does not mean there is no difference between these two understandings of legitimacy. This is manifested only in the cases where legitimacy as moral power does yield different results than legitimacy as liberty right, i.e. in the instances where exercise of moral power affects moral rights and privileges, an effect which the 'legitimacy as liberty right' view cannot account for.

[66] Applbaum, (n 16), 86; Applbaum, (n 16), 58.

FIGURE 2 THE CONCEPT OF LEGITIMACY



Applbaum illustrates the distinction of the power-liability view with the liberty right view, with the following example[67] of a legitimate authority's moral power to change the normative relations between two other parties, with legitimate authority being a court decision. We are asked to imagine a coastal legal order, where a specific beachfront property extends to the mean high tide line. Thus, everyone is permitted to walk, boat or fish below that line. There is distance between each house at the beach and locals have used pathways between the houses to access the sea since anyone can remember. We are to imagine a man, Clamdigger, who owns a clam flat, which is accessible by land only via such a path. Clamdigger's family has used such paths for generations and although this particular path has never been subject to adjudication, in this jurisdiction courts have ruled in similar cases that paths are public rights-of-way by custom and adverse possession. The next person of interest in this example is Mr Beachowner who purchases a property across Clamdigger's path. Beachowner prevents access to the path, which he regards as part of his property, which is shown by him stringing a chain across the entrance to the path with a 'No Trespassing' sign hanging from it.

Although the town, siding with Clamdigger, litigated, Beachowner won the lawsuit, successfully defended on appeal, and the sign thus remained. Applbaum asks us to suppose that on the legal merits, and on whatever account of interpretation one chooses to commit to, the case was wrongly decided: on a positivist account, the substantive

[67] Applbaum, (n 12), 60-63.

result is not supported by the legal materials; on a Dworkinian account, the substantive result is not supported by the appropriate moral reading of the law. In any case, since the courts have authoritatively determined the parties' legal claims, the ruling is valid law. Notably, Clamdigger does not deny the *legal* validity of the legal ruling. By contrast, he concedes that Beachowner now has the *legal* right to block access to the path, and that using the path without permission would constitute a violation of a legal duty. It is also the case that, no matter what conception of legitimacy Clamdigger commits to, he does not deny the legitimacy of the authority of the legal ruling. He accepts that the court had the moral power to rule as it did, and, though mistaken in one sense, the court is not mistaken in another: it has not abused its power. This is exactly the kind of mistake the court has the moral privilege to make. Clamdigger concedes that he is an addressee of the ruling, he is subject to it, and that therefore the ruling changes his normative situation. What Clamdigger *does* deny - not necessarily because of a general denial that law obligates, but because of the specific attributes of this case – is that he has a *moral* obligation to obey the ruling. So Clamdigger feels morally permitted to violate the law (the legally valid ruling) and thus skips over the chain and walks down the path to dig clams as he always has done. Applbaum accepts that Clamdigger may (or may not) be making a moral mistake. The question he addresses is not whether Clamdigger is making a *moral* mistake, but whether Clamdigger is making a *conceptual* mistake. Clamdigger's view is that the court ruling is legitimate, but does not *morally* obligate him. Does this necessarily imply that Clamdigger has incoherent views about legitimacy? Applbaum rightly states that the answer depends on whether the moral power of the court to change Clamdigger's normative situation, and correlatively, his moral liability to such change, can be explicated in a way that does not cash out, either directly or circuitously, in a moral duty to obey the court order.

So we should compare the normative relationships between Beachowner and Clamdigger before and after the court ruling. Before the decision, under the legal interpretation at that time, Clamdigger had a moral claim-right against Beachowner not to have his right-of-way blocked, and Beachowner had a correlative moral duty not to block Clamdigger. It could be argued that the court ruling reverses this entirely, so that Clamdigger now has the moral duty and Beachowner the claim-right. But there is another possibility that still counts as a change in their normative situation: the ruling could grant Beachowner only a moral *privilege* to put up the chain, and Clamdigger

only a moral *privilege* to jump the chain. Clamdigger's privilege is not unbounded: before, he might have had a privilege to rip down the chain blocking the path, and perhaps now he has a new moral duty not to damage the chain while climbing over; both before and after, he has a moral duty not to use violence against Beachowner's person. Besides, as N E Simmonds rightly states, the Hohfeldian scheme of analysis allows Hart's point that frequently liberties find a perimeter of protection in claim rights protecting one from such interference as assault and trespass.[68] Beachowner is entitled to use stronger measures: he may build a high fence, or post a guard (but not set a mantrap or plant landmines). What other duties and their correlative claim rights are is a matter of exercising ones imagination. However, these are not the kinds of duties that are needed for the legitimacy-entails-duty view to succeed: the court has ordered Clamdigger off of the path, and *that* precise duty, is the one Clamdigger, without contradiction, denies. The court has attempted to grant Beachowner a moral claim-right, the right not to have his land crossed without his permission. However, Clamdigger claims, again without contradiction, that the court has achieved only something weaker: it has succeeded in granting Beachowner only a moral *privilege* to attempt to prevent the crossing of his land. If the supposed injustice to Clamdigger were greater, Clamdigger might have viewed the law as without any normative effect whatsoever, and held that Beachowner still is under a moral duty not to block access. But Clamdigger has taken a more nuanced view of what substantively mistaken but legitimate law accomplishes here.

Aplbaum is not arguing for the moral attractiveness of this construal; he does not maintain that as a matter of substantive morality Claimdigger does indeed have the moral privilege to use the path and the Beachowner has the moral privilege to prevent him from doing so. Applbaum is well-aware of the instability and uncertainty that positing such misfirings of authority creates, of the difficulties that arise from letting us be judges in our own cases, of the need for procedural finality to settle substantive disagreement, and so on and so forth. Applbaum is posing a different question: is Clamdigger making a *conceptual* error in holding that the court is a legitimate authority, in that it has the moral power to change his normative situation so that what was his

[68] 'Hohfeld would merely seek to point out that the effectiveness of such a perimeter of protection is a purely contingent matter: it is not *entailed* by the concept of a right.' N E Simmonds, 'Rights at the Cutting Edge', Kramer M, Simmonds N E and Steiner H, *A Debate Over Rights: Philosophical Enquiries* (Oxford Scholarship Online 2010) DOI: 10.1093/acprof:oso/9780198298991.001.0001 184.

moral claim-right now is merely a moral privilege, but does not, under the circumstances, have the moral power to impose a moral duty? The answer is that he makes no such conceptual mistake. Notably, this conclusion does not depend on the particular reason because of which authority misfires here: that a determination of law is substantively mistaken. In other words, the fact that the court ruling is substantively false (not provided for by the legal materials, assuming a legal positivist view) is irrelevant to Clamdigger maintaining that legitimacy being moral power and the court being a legitimate authority mean that the court ruling changed his normative situation and it did so by substituting his moral obligation with a moral privilege, not moral duty. Moral and conceptual questions are different kinds of questions and must be kept separate. The answers of the one are not reducible to the answers of the other. Applbaum grasps this crucial distinction. Whether Clamdigger, after the court ruling and because of it, has a moral duty or moral privilege is a moral/substantive question. Whether he is right or wrong is a question of substantive morality, which invites for exactly that kind of discussion. Assuming moral objectivism, one would have to presumably determine the relevant objective moral principles and derive from them any relevant moral duties, and by contrast determine what is morally permissible/moral privilege. Regardless of whether he does, as a matter of objective morality, have a moral privilege instead of a moral claim right after the court ruling, Clamdigger is correct on the conceptual question. It is *conceptually* correct and consistent to hold that the court, being a legitimate authority and thus having the moral power to change normative relations, has changed Clamdigger's moral claim right to moral privilege, even if it is the case that this is not *morally* correct. By the same token, if Beachowner's property right over the path had been established by legislation, or even constitutional amendment, so that the legal validity of the law's substance were uncontested, Clamdigger would still not be making a conceptual mistake if he held that he is not obligated because of the substantive unfairness of law whose substantive validity is not in question.

As a final note, Applbaum rightly points out that this account does not depend on the command-backed-by-justified-force or rather say legitimacy-as-claim-right account. No appeal has been made to any permission the court has to enforce or punish. Legitimacy of the court and its decision does not imply a moral duty to obey the decision. The normative power of the court changed the normative relations between the

two parties. This would the case even if the legal rulings in this jurisdiction were merely unenforceable pronouncements of what the law requires. 'So the normative relation of the court to the parties is poorly captured by reducing it to a permission with respect to the parties. What the court has is the normative power to change the normative permissions that hold between the parties.'

On first glance, the court decision could have three results vis a vis the parties. First, it could be the case that there is a complete reversal: Before, Clamdigger had a moral claim-right against Beachowner not to have his right-of-way blocked, and Beachowner had a correlative moral duty not to block Clamdigger. One might hold that the court ruling completely reverses this, so that Clamdigger now has the moral duty and Beachowner the claim-right. This would be the legitimacy as claim right view. The argument would be as follows:

1. Legitimacy is a claim right.
2. The court decision is legitimate.
3. Therefore, the court decision establishes a moral claim right.

Since the court decision ordered Clamdigger off the path, the moral claim right established by legitimacy of the decision would be Beachowner's claim right to block access to the path and respectively Clamdigger's moral duty to not access the path. Regardless of our view of legitimacy, a legally valid court decision establishes legal rights and legal duties. Legitimacy, only according to the view of legitimacy as claim right, establishes a moral claim and thus a respective moral duty to obey. In this case then, Beachowner's claim right that Clamdigger does not access the path and Clamdigger's duty to not access the path are both not only legal, but also moral. The problem here is that understanding legitimacy as a claim right seems to assume that legal validity entails not only legal consequences but also moral consequences; it assumes that there is moral duty to obey the law. Indeed, just like establishing moral duty to obey the law requires a substantive moral argument, by the same token, legitimacy as a claim right with the correlative moral duty can only be presented in a substantive moral argument as a normative conception of legitimacy, not as a matter of conceptual analysis. As explained before, legitimacy alone does not entail moral duty to obey.

Abandoning the legitimacy as claim right view, there are two other options remaining. The middle view would be Applbaum's legitimacy as moral power view, with milder change at the normative status, and at the other side of the spectrum there could be no change at all to the normative status, i.e. the court decision affects the legal but not moral relations of the parties. This would be the liberty right view, from which Applbaum tries to distance his power-liability view.

Is there something to be said from the 'legitimacy as a liberty right' view against the 'legitimacy as a moral power' view? Applbaum himself states that if the supposed injustice to Clamdigger were greater, Clamdigger might have viewed the law as without any normative effect whatsoever, and held that Beachowner still is under a moral duty not to block access. If the court decision has no normative effect whatsoever, the moral relations between the two parties remain the same before and after the decision. The decision being legally valid entails the change in legal relations between the two parties, which manifests the fact that the court decision has legal power. Does it have moral power to change moral relations? The decision being legitimate means that the court had the first order liberty right, or the second order liberty right (moral power) to decide as it did, (regardless of the correctness of the decision).

If we view the court decision as having no normative effect whatsoever, then the legitimacy as liberty right view and the legitimacy as moral power view fully overlap as they make the same entailments, in other words they are entirely the same. If, on the other hand, we view this court decision as having the normative effect of turning Clamdigger's moral claim right (to access the path) into a moral liberty right (moral privilege) and Beachowner's moral duty (to not block access to the path) to moral privilege, then the legitimacy of the court decision has changed the normative relations of the subjects of legitimacy, which are the parties of the case, a change which cannot be accounted for by the legitimacy as first order liberty right view. This is exactly why and how the legitimacy as moral power view is distinguished from and wins over the legitimacy as first order liberty view.

Applbaum is 'not arguing for the moral attractiveness of this construal.' In other words, he takes no stand as to whether the legitimacy of the court decision performs this change in normative relations to the subject of legitimacy. This is a moral question

which is besides the point. ‘But the question before us is a different one: is Clamdigger making a conceptual error in holding that the court is a legitimate authority, in that it has the moral power to change his normative situation so that what was his moral claim-right now is merely a moral privilege, but does not, under the circumstances, have the moral power to impose a moral duty? The answer is that he makes no such conceptual mistake.’ Only legitimacy as a moral power view accounts for the change of the normative status of the subjects of law, in the cases that we view the law as having normative effect. Legitimacy as a moral power allows for a possibility that legitimacy as a (first order) liberty right view cannot account for and this is what establishes legitimacy as a moral power the correct view of legitimacy.

To end the presentation of legitimacy as a moral power view, I will present Applbaum’s motorist example which not only blocks reduction of the view to the legitimacy as a moral claim view which may by now seem redundant, but, and that is more important for our discussion at this point, it illustrates an important distinction: that moral permission (liberty right) is static, whereas moral power is dynamic. I will first present the example and then Applbaum’s distinction of power from permission based on this example.

In the ‘motorist and the long red light example’, Applbaum makes the point that the power-liability view, in other words legitimacy being a moral power, blocks the reduction to claim-right view. Suppose that for a long time, there has been a stop sign regulated traffic at a sparsely travelled intersection at the outskirts of a town, with flat desert all around. After a highly publicized fatal accident at a stop sign at a very busy intersection in the center of town, and taking advantage of a temporary price reduction offered by the local distributor of traffic control equipment, the town council decides to replace every stop sign under its jurisdiction with a traffic light and to post “No Turn on Red” signs at every one. However, this model of traffic light is a bargain because the lights are preset to change at long intervals and their timing mechanisms are cumbersome to reprogram. Now suppose a motorist wishes to turn right at the sparsely traveled intersection, approaches just as the light turns red, and she knows from prior experience that she will have to wait for a long time. It is a clear day and there are no pedestrians, bicyclists, or other cars are in sight. She thus turns on red, with great care. For her bad luck, there was a police officer on a motorcycle hidden behind a cactus, he

stops the Motorist and writes her a ticket, which she accepts and pays ruefully, but without resentment. She pays the ticket, not because she fears the consequences of not paying, but because she believes that she ought to. Next time, she takes a long hard look at the cactus before turning on red. The point here to sketch the violation of legitimate but bad law—bad in the sense of poor, not immoral. The faulty considerations upon which traffic regulation in this town is based are not intended to amount to illegitimate corruption. The faultiness is intended to be, at least ex post, common knowledge and uncontroversial. If this hypothetical specification suggests something else to the us, we can just rearrange the facts to fit an example of a law that is uncontroversially legitimate and uncontroversially bad. Applbaum does not intend to give an example that tests our convictions about the moral obligation to obey silly but legitimate laws. Appbaum believes that there ordinarily is such an obligation, and until convinced that a red light actually is broken, he maintains one should sit at it, with thinning patience fortified by thoughts of respect for fellow citizens. Rather, the purpose of the example is to make plausible two claims: that such an obligation is no conceptual entailment of the law's legitimacy, but that legitimacy is not merely command backed by justified force. She denies the first view. Motorist denies that, under the circumstances, she has a moral duty not to turn on red, accepts that the police officer is justified in ticketing her, and accepts that she ought to pay the fine. The question Applbaum is asking is again conceptual: is this a coherent set of positions? Does her view entail that the town council and police officer do not have the moral power to enforce traffic law, but, like Rubbish-burner, have merely a moral permission, and so do not have legitimate authority over her? Alternatively, does her recognition that she ought to pay the fine reduce to a moral duty to obey the law? Applbaum rightly detects that neither construal is necessary. This is because the Motorist can consistently hold that the town has the moral power to impose upon her traffic fines— correlatively, that she is morally *liable* to have traffic fines imposed upon her—but *not* the moral power to impose upon her a moral *duty* to obey this traffic regulation. Like in the previous example, the distinction between substantive moral argument and conceptual argument must be maintained. Her recognition that she ought to pay the fine would follow from a substantive moral argument, rather than a conceptual analysis, of what minimal respect for legitimate law requires. Applbaum rightly informs that such an argument could make use of the ideas employed in defining and justifying civil disobedience: the outer limits of fidelity to the law, a natural duty to support just institutions, and the willingness to accept punishment

as a demonstration of good faith, even though this is not a case of civil disobedience, Still, she can deny reduction to the legitimacy-entails-duty view, because the exercise of legitimate authority has misfired, because it fails to impose the moral duty that it sets out to impose: the Motorist retains the moral privilege to turn on red. Such an argument may not succeed, but if it is defeated, it will be on substantive *moral* grounds, not by demonstrating a contradiction. In other words, it would be defeated as a substantive moral argument, not conceptually; she can be held blameworthy for being immoral, not inconsistent. Notably, Applbaum distinguishes the Motorist from Bad Woman Motorist. The latter recognizes no moral reason to pay fines, and does so only when it is in her interests to do so. Bad Woman Motorist's conception of legitimate authority does appear to be no more demanding than the command backed by justified force/legitimacy as claim right view. But Motorist pays her fines even if she could successfully evade them, and in doing so, recognizes her moral liability. If you one is yet not persuaded, Applbaum asks us to substitute Honor System Motorist. This one doesn't simply recognize that she ought to pay traffic fines when caught. To make thing some dramatic, she voluntarily mails in the applicable fine every time she turns on red. Her normative view is as follows: respect for legitimate law requires that one should pay the penalty for every violation, whether enforced or not, but there are circumstances under which there is no moral duty to obey the law in the first instance. The views of neither Motorist, Bad Woman Motorist, nor Honor System Motorist could reasonably be held about all legitimate law, whether malum in se (evil behaviour in and of itself) or malum prohibitum (unlawful behaviour in virtue of the law). Indeed, the ends of fair social cooperation are not served if all laws are treated merely as price schedules, whether paid voluntarily or under threat. But some laws (parking meter ordinances perhaps) are or have become mere price schedules, and recognizing that this is so does not endanger their standing as authoritative; if you deny a moral obligation to vacate a parking space before the meter expires there is no conceptual entailment between legitimacy and duty that you fail to recognize. Motorist, like Clamdigger, judges that under certain circumstances, particular legitimate *legal* duties that she is subject to are not for her *moral* duties, but merely moral *liabilities* imposed by a moral *power* to which she is subject. Her mistake, if she is making one, is not conceptual. [69]

[69]Applbaum, (n 12), 63-66.

Finally, Applbaum distinguishes between moral power and moral permission.[70] Indeed, someone who has only moral permission, liberty, to use force, does not have a mora power to change the normative situation. This is exactly the difference between first order rights, claim rights and liberties/permissions, on the one hand, and second order rights, namely powers and immunities. Permissions are static, whereas powers are dynamic. Thus, a permission being a static normative advantage, means that one either has it or he does not have it; one may or may not be able to delegate or assign it; and we need not have any control over when and how a permission is first granted or acquired or when and how it can be lost or taken away. I either have or I do not have the moral permission to pick a pebble from the beach. I have that moral permission/liberty if no one has a claim right to the pebble, and I do not have moral permission/liberty if someone else does have a claim right to the pebble, e.g. deriving from ownership of the pebble (e.g. if the pebble is in a private beach). It is not necessary that I have control over whether I have that permission or not – in this example, the existence of the liberty depends on whether someone else has claim right to the pebble or has given that claim right away. By contrast, a normative power is the ability to bring into existence or change other normative statuses, including permissions. A power is a normative status which generates other normative statuses: it *enables*.

Applbaum is correct to notice that this distinction is obscured when the authority and the enforcer are the same entity. This is why in the example with the town council and the police officer, , where the authority (town council) and the enforcer (police officer) are different, it is clearer that the authority changes the normative status of both the enforcer and the subject. The authority, exercising its moral power with respect to the subject (Motorist), grants the enforcer (police officer), a moral permission (and perhaps a moral duty) to enforce; the subject was morally liable to having her normative status changed by such enactment, and now is morally liable for specific enforcement. Power here is the ability to enact. Applbaum notes that this is why legitimate authority is typically exercised through speech-acts and why e.g. Hobbes sees authorities as the authors of the actions of their agents. Before enforcement against the subject is permitted, the status change must be enacted - the power must be exercised. To put it clearly, 'In authority as mere permission, the authority says to the agent of enforcement:

[70] The next few paragraphs are adaptation from Applbaum, (n 12), 68-71.

"I am permitted to force that subject to comply, and you are my agent. On my behalf, force that subject to comply." In legitimacy as normative power, the authority says to the agent of enforcement: "I have the power to make it the case that you are permitted to force that subject to comply. I hereby invoke that power. Force that subject to comply." This can be so even if the authority itself never has permission to enforce.' How can the last sentence be true? Because the members of the city council may not have the power to grant themselves permission to write traffic tickets. If they have the power, they still have to grant it to themselves. An accurate example Applbaum mentions is with President Richard Nixon, who had the power to order Attorney General Elliot Richardson to dismiss Special Prosecutor Archibald Cox, but did not have permission to do so himself, hence the drama of what became known as the Saturday Night Massacre.

Understanding legitimacy as moral power (the power-liability view), Applbaum continues, explains what is especially wrong with the abuse of force by officials and with extra-legal vigilantism, even when the actions taken track what a properly authorized outcome would have been; this explains why the victims of the improper use of force by officials have a serious complaint even when they get what should have been coming to them through proper channels. Fear of arbitrary and mistaken application of force does not entirely explain our strong negative emotional reaction, our horror to these abuses. We would be correct to be indignant, even if the same exact enforcement from some other official were properly authorized, if the enforcing official were not properly authorized, because we have moral immunity from the exercise of unauthorized powers. It is also not the case that public official simply did something wrong: we do not have the same horrified reaction to an official who misuses his office for personal gain without exercising force or coercion over subjects. 'The morally liable subject still is morally inviolable until the power to which she is liable is invoked.' This is not the case under the account that reduces all moral powers to moral permissions (legitimacy as moral liberty) to exercise legal powers. Under the legitimacy-as-moral-liberty account, the subject is never inviolable with respect to the authority. This is because the authority already has permission to use force, and the subject already has the correlative no-right against force.

The Motorist does not need to *view* legitimate authorities merely as entities that have moral permission (over some domain) to force her (in certain ways), when she considers

herself morally fee to turn on red and police officer to ticket her. That would leave her normative status unchanged once the city council had an initial *moral* permission to regulate traffic. In that case, enactment and enforcement would be rearrangements of *legal* advantages and disadvantages, not moral ones. The Motorist could still be *morally* wronged by the council and by the police; but such a wrong would trace back to some overstepping of the initial conditions of and on the moral permission. In contrast, on the power liability view, the city council has an initial moral power to regulate traffic, and Motorist is liable to that power. Her normative situation changes depending on how that power is exercised.

As with the court in Clamdigger, Applbaum observes that apart from the power of enforcement and punishment, the city council's power to regulate traffic also gives it the power to change normative relations between other parties. Indeed, motorists may have acquired specific moral duties of care to one another that they did not have before, because others will act in reasonable reliance on the new traffic signs. Motorists who ignore the sign are legally liable under tort law, because turning on red may reasonably be taken to be conclusory with respect to legal judgments of negligence. The *moral* case may be different: someone who turns on red may have exerted all due moral care, but because of freakish circumstances causes damage (say a balloonist at that moment falls out of the sky). The Motorist has still no *moral* complaint about *legal* liability.

Indeed, Applbaum rightly observes that it would be quite odd for a lawmaker to defend creating and enforcing an unjust or bad law on the grounds that it is legitimate. From the first-personal perspective, I am most certainly morally prohibited from issuing an unjust law and have good reason not to issue a bad law, even if I have the legitimate authority to do so. However, this shows that legitimacy is primarily a practical judgment made from the second- and third person perspective. This means that legitimacy governs how *you*, the moral patient, should react to *my* unjust or unwise moral agency, whether lesser officials should enforce, and whether third parties should intervene. Or, to put it differently, the question of legitimacy arises when there is disagreement about the justice or goodness of an authority's command. The claim right view holds that to judge an authority legitimate simply is to judge that the subjects of that authority have a moral duty to obey it. According to Applbaum, to judge an authority legitimate simply is to judge that the subjects of that authority are *morally*

liable—that is, not morally immune—from the exercise of a *moral power* to impose and enforce conventional duties and change relevant social facts in ways that change the subject's normative situation. It is an open question whether subjects face a moral duty as well.

2.4. Conclusion

In this chapter, I presented the framework of conceptualizing legitimacy and prepared the ground for the thesis statement that will follow in the next chapter. In particular, I presented the trichotomy of legitimacy, which helps us understand legitimacy as a concept independently of its conceptions. By drawing on different uses of the concept of legitimacy that are as unrelated between them as possible, we concluded that the content of legitimacy at its most abstract form (Tier 1) is, as Applbaum rightly calls it, a vague notion of properness. This is extremely important for understanding legitimacy and for the thesis of this discussion, which will follow in the chapter, because any conception of legitimacy specifies this abstract content. In order for a standard to be a conception of legitimacy, it must specify how the object of legitimacy is proper. In Tier 2, legitimacy becomes more concrete, lower on the level of abstraction, by being matched with an object of legitimacy. Thus, there can be several 'Tier 2', depending on the object types in question. 'Legitimate argument' and 'legitimate daughter' belong in different tiers of the second level. What interests us in this discussion is legitimacy of the four objects of legal form, namely actions, norms, actors and legal systems.

In order to further understand the concept of legitimacy we are referring to in this discussion, I made certain important distinctions. I clarified that the discussion pertains to normative, not sociological legitimacy, and that as a matter of conceptual analysis, these two kinds of legitimacy are not logically connected. None is a necessary and/or sufficient condition for the other. Any connection between them would have to be established by a particular conception of legitimacy (Tier 3), specifying the necessary and sufficient conditions for legitimacy to obtain. For descriptive legitimacy to be distinct from normative legitimacy, it has to be the case that normative legitimacy is not reduced to human attitudes, and it is thus not relative, but objective, in the sense of attitude-independent. This led us to refuting nihilism, the view that there are no objective moral facts. I explained how it is that three nihilist theories, namely error

theory and two relativist theories, individual relativism and cultural relativism, must be rejected in order for discussion on normative legitimacy to take place. I clarified that I did not attempt to disprove nihilism, which is a negative position, but I merely illustrated that nihilism is inconsistent with normative legitimacy; one can hold the one or the other, but not both at the same time, because either there are, or there are not, objective moral facts. If legitimacy is at least partly moral, then it is at least partly substantive. This excludes an entirely procedural conception of legitimacy. This led us to the next question, namely whether legitimacy is substantive or procedural. We concluded that as a matter of conceptual analysis, legitimacy is not entirely procedural but at least partly substantive, and that any understanding of legitimacy as entirely procedural would have to be argued as an individual conception (Tier 3). Both Applbaum and I advise against such a conception, since such a conception will have to deal with issues such as committing to substantively inappropriate and undesirable outcomes and lapsing into legal validity.

In the final part of this chapter, I established the minimum content of legitimacy in terms of the four object types of legal form (apart from it being a vague notion of properness). I presented the two established views of legitimacy as a clam right on the one hand and a liberty right on the other, and finally explained, as per Appblaum, how it is that legitimacy is a moral power.

Having established the core of the concept of legitimacy as moral power, the discussion pertaining to the content of the concept of legitimacy detached from its individual conceptions has been completed. Having assumed a distinction between conceptual analysis and normative conceptions, it would seem that the next logical step is to proceed to normative conceptions, moving the discussion from Tier 2, to Tier 3. The legitimacy discussion would be incomplete, however, if we do not clearly understand how it is that the concept of legitimacy is different from neighbouring concepts, especially authority. After that, I will discuss the relation of legitimacy with individual conceptions and end the next chapter with the main argument of this discussion, the thesis statement, which is also the main original contribution to knowledge: that legitimacy is an essentially contested concept.

CHAPTER 3
Concept and Conceptions

3.1. Introduction

Conceptual analysis implies determining the relationship of the concept in question with neighboring concepts. Defining a concept implies delineating the concept from neighboring concepts. In Greek, the word for definition is ορισμός (orismos), which comes from the verb 'ορίζω' (orizo) which means to define in the sense of delineate and separate from neighboring conceps, thus the derivative noun 'όριον' which means limit and border (σύν-ορον – synoron, border). To fully undersand a concept, we must be able to understand how it is distinct from neighboring concepts. When dealing with abstract concepts as with legitimacy, in order to understand the relationship betweensuch concepts, it is necesary to define both.

Conceptual analysis implies figuring out the minimum content of a concept and determining the nature of a concept, such as whether is moral power and/or a contested or an essentially contested concept. If common understanding of neighboring concepts seems, at least on first glance, to present an overlap between two concepts, then one can cast doubts as to whether the two concepts have been clearly determined and defined. None of the two concepts can be fully understood, unless the neighboring concept is defined and so is the relationship between the two neighboring concepts. Suppose that 'legitimate authority' refers to a state that has good reasons for using legal rules, enforcing them and generally maintaining order. How are we expected to understand how much of the content of the concept of 'legitimate authority', whatever that is, falls under 'legitimate' and how much under 'authority'? If 'legitimate authority' implies changing the normative situation of the subject of law, then how can we be anything but confused if we are not sure whether the change of normative status is implied in both 'legitimate' and 'authority'? Does 'legitimate authority' include a repetition/overlap? If so, have we made a mistake somewhere in conceptual analysis? If not, what exactly does authority mean and what is its relationship with legitimacy? Similarly, how can 'legal legitimacy' make sense, given the analysis so far? If normative legitimacy implies moral objectivism, there is room for substantive legitimacy and legitimacy is contrasted

with legality as in the aforementioned Kosovo report (illegal but legitimate), how can 'legal legitimacy make sense?

In this chapter, I will discuss conceptual relationships pertaining to the concept legitimacy. In particular, I will refer to the relationship of legitimacy with neighbouring concepts on the one hand, and with individual conceptions on the other, to conclude that legitimacy is an essentially contested concept.

As regards the relationship of the concept of legitimacy with other concepts, I will focus on two major points, one negative and one positive. I will begin by discussing the so-called 'legal legitimacy'. The term certainly seems to express a concept neighbouring the concept of legitimacy. However, I will explain that the so-called 'legal legitimacy' is actually a non-concept. Then, I will proceed to the positive and more significant point of this part, which is discussing the most important neighbouring concept to legitimacy, namely authority. I will analyse the concept of authority, explain when/how it obtains and identify the relationship between the concepts of authority and legitimacy.

Having discussed the issue of conceptual relationships between legitimacy and neighbouring concepts, in the second part of this chapter, I will discuss the distinction between concepts and conceptions, to reach the main claim that legitimacy is an essentially contested concept. I will start by showing, as per Gallie, when the conceptions of a concept stand in such a relationship between them and the concept, so that they render the concept essentially contested. I will then discuss how Hart, Rawls and Dworkin engage with the issue of concept vs conception distinction and whether they refer to contested concepts or essentially contested concepts. Finally, I will conclude to what is the greatest contribution of this thesis to knowledge, i.e. that legitimacy is an essentially contested concept. In doing so, I will refer to several instances which illustrate how it is that legitimacy is an essentially contested concept, mainly cases where circumstances/facts give rise to competing conceptions of legitimacy and cases where the single conception of legitimacy itself is essentially contested.

3.2. Legitimacy and Neighbouring Concepts

3.2.1. The Non-Concept of 'Legal Legitimacy'

The straightforward distinction between legality and legitimacy has been referred to in a previous part of the discussion. Legality, i.e. being in accordance with the law, is easily contrasted with legitimacy. As concluded in section 2.3.3. of the discussion, as a matter of conceptual analysis, there is room for legitimacy to be at least partly substantive, and it is best understood as such, since focal uses of legitimacy are contrasted with legality. Such was the case of the Kosovo report, which recognized an attack against a sovereign state as being illegal due to lack of UNSC resolution, yet the report regarded the attack as legitimate on the moral ground of preventing a humanitarian catastrophe. A conception of legitimacy comprising only of procedural criteria would hardly be in line with legitimacy as a *moral* right to rule and would collapse the concept of legitimacy to legality, given that procedures are established by law. Like a procedural conception of legitimacy would collapse legitimacy to legality, the so-called 'legal legitimacy' collapses legitimacy to legal validity, at least as long as one remains committed to legal positivism.

I will now explain how it is that assuming legal positivism, there is no such thing as 'legal legitimacy'. "Legal legitimacy" is defined as "a property of an action, rule, actor or system which signifies a *legal* obligation to submit to or support that action, rule, actor or system.'[71] There seems to be lack of clarity here: what does 'signify' mean? Does it mean 'create' a legal obligation or indicate an already existing legal obligation? If it means create a legal obligation, then the definition is incorrect because legal obligation is created by legally valid rules, not by any other concepts such as the so called 'legal legitimacy'. The legal validity of rules is what creates legal consequences, whether these are creating legal rights or legal obligations. The question then becomes what makes rules legally valid. This is exactly what legal positivism answers. According to legal positivism, which is nothing more and nothing less than a proposition of legal validity of norms, "In any given legal system, whether a given norm is legally valid, and hence whether it forms part of the law of the system, depends on its

[71] Christopher A. Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 (4) Oxford Journal of Legal Studies 729, 735. (Emphasis mine). It is important to note that Christopher Thomas is presenting, though not arguing for, the concept of 'legal legitimacy'.

sources, not its merits."[72] 'Sources' is read broadly, i.e. any argument for the validity of norms which is not merits-based.[73] Thus, in the legal positivist tradition, represented most famously by Hans Kelsen and HLA Hart, to claim that a law is legally valid is to claim that it was created in accordance with the correct legal process. In Kelsen's view, the test for legal validity is conducted recursively from the lowest to the highest norm (hierarchy of legal norms), until a non-legal, meta-legal fundamental norm for a legal system, the G*rundnorm*, could be reached, for which authority is 'presupposed'.[74] According to Hart, legal validity is traceable to a 'rule of recognition', which is, contrast to Kelsen's Grundnorm, not a norm, but a social fact.[75] For legal positivists then, a norm is legally valid if it has been established in accordance with the correct process, which is the source of validity, regardless of the merits of the law which are substantive, e.g. moral, immoral or morally irrelevant. If a rule is legally valid, it exists in the legal world, so it bears legal consequences, it may grant legal rights or set legal obligations. Therefore, assuming legal positivism, legal obligations are consequence of the legal validity of certain norms. The property which creates legal obligations is nothing more and nothing less than the legal validity of rules. Therefore, 'legal legitimacy' is nothing more than legal validity, and thus a term better not used as it merely adds confusion. If 'signify' means to indicate an already existing obligation, then legal legitimacy is again void of meaning: legal validity itself is not only the necessary but also the sufficient condition of a norm to bear legal consequences, including establishing legal obligations. No other properties can be used to indicate (already existing) legal obligations. Therefore, no matter what meaning we ascribe to the term 'signify', the fact remains that its meaning is already consumed by legal validity, as per legal positivism.

Since 'legal legitimacy' adds nothing to legal validity, it is unsurprising that when discussing 'legal legitimacy,'[76] writers discuss requirements of legal validity, and thus, inevitably, legal positivism and natural law, with no mentioning of any requirements of

[72] John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 American Journal of Jurisprudence 199, 199. Note that Christopher Thomas refers to legal positivists such as Kelsen and Hart at this point. Although this is not wrong, it is important to distinguish legal positivist theories with legal positivism per se, which is merely a proposition of legal validity of norms. It is accepting this proposition that makes one a legal positivist. The crucial point here is not whether one accepts a specific legal positivist theory (Hart, Kelsen, Raz etc.) but whether one accepts legal positivism per se.
[73] Ibid, 200.
[74] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg translation, Lawbook Exchange 2007), 110-122.
[75] HLA Hart, *The Concept of Law* (2nd ed, OUP 1994), 100-110.
[76] Thomas, (n 71), 734-738.

legal legitimacy per se. This is not an omission, but an inevitability. There cannot be any requirements of a concept which does not exist and which, assuming legal positivism, collapses to legal validity. What is said about 'legal legitimacy' actually applies to legal validity. Like legitimacy, 'legal legitimacy' is indeed normative and it too assesses any given object against a particular normative framework.[77] It is again unsurprising that there is no mentioning of what/which this 'framework' is. Interestingly enough, legitimacy is labelled 'moral legitimacy,'[78] so since legitimacy is unsurprisingly understood as assessing objects to moral framework,[79] 'legal legitimacy' can only be understood to assess given objects to legal framework, i.e. law, legal validity. No other sense of 'normative' apart from moral and legal framework is presented.

Although, assuming legal positivism, 'legal legitimacy' is a non-concept, it *may* be a concept assuming natural law. It seems to me that assuming natural law, 'legal legitimacy' would collapse to legitimacy, since its ideal conceptions are substantive and include moral criteria. 'Legal legitimacy' then is a non-concept and attempts to ascribe meaning to it oscillate between legal validity on the one hand and legitimacy on the other.

The issue of whether there is, finally, a concept of 'legal legitimacy', in the end rests on the disagreement between legal positivism and natural law, which I shall now discuss. Although legal positivism, i.e. the proposition of legal validity of norms, has already been discussed, I will clarify certain misconceptions about legal positivism which often blur the distinction between legal positivism and natural law. After these necessary clarifications, I will present natural law and conclude whether there is such a concept as 'legal legitimacy.'

The first misconception about legal positivism which may blur the distinction between legal positivism and natural law is that legal positivism has the 'disadvantage' of maintaining the view that there is no necessary connection between law and morality.

[77] Ibid, 735.
[78] Ibid, 738.
[79] Which framework that is depends on the standard/conception of legitimacy one assumes. Christopher Thomas does not clarify this point. This point becomes very clear, however, in the framework I provide in this discussion.

This claim requires clarity. Both law and morality are normative frameworks. As such, there are bound to be necessary connections between them. Legal positivism, the proposition of legal validity of norms, does not make a claim about law and morality in general, i.e. it does not make a claim about the whole nature of law (it is thus a mistake to regard legal positivism's distinctive *thesis about* law as a comprehensive *theory of* law), but a claim about the condition of legal validity of norms in particular. The only claim that can be inferred from the proposition of legal validity of norms, also known as the source thesis, is a more specific claim: legal validity and the moral justifiability of the law's substance are entirely separate.[80]

Since legal validity and the moral justifiability of the law are separate, the formal fact of legal validity creates a legal obligation to obey, but not necessarily a moral obligation to obey. Of course, a given law can be moral (e.g. criminal laws prohibiting murder and theft), immoral (e.g. older laws regarding slavery) or morally irrelevant (such as rules of coordination), but the question of moral justifiability lies outside the question of legality/legal validity. In this sense, legal validity is a purely formal fact – an 'amoral datum'.[81] Legal obligations and moral obligations do not necessarily coincide. Any connection between them may be contingent, but not necessary.

Not only legally valid norms tell us nothing about what our moral obligations are, but, more generally, legal positivism itself is not action guiding. The proposition of legal validity tells us which norms are legally valid, which can be used as a premise in practical syllogism. If one needs to know what the law in any state says on some subject on some occasion, then the truth of the proposition of legal validity of norms as per legal positivism tells us how to proceed. According to this proposition, one should look for sources of the law of that state, not what is meritorious for people in that state to do. However, the proposition of legal validity is never a premise in practical syllogisms. This means that *by itself* it does not direct human behaviour; it does not point the addressee of law in favour or against doing anything at all. Not only it provides no moral guidance, but also it provides no legal guidance either.[82] A morally conscientious and rationally self-interested traveller in a foreign country acting on prudential reasons

[80] Thomas, (n 71), 736.
[81] Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630, 656.
[82] Gardner, (n 72), 202.

and being interested on what, as a matter of fact, the consequences on him/her will be depending on which course of action he/she follows, is not interested in the proposition of legal validity. His/her behaviour is based on reasons for action. This is where Raz's theory of authority (not legal validity) becomes relevant, as it pertains to reasons for action. Raz's theory of authority lies beyond, and is most certainly not an entailment of, the proposition of legal validity.

Natural law, however, pertains to reasons for action as it treats moral justifiability as a condition of legal validity. Thomas Aquinas, for instance, is often quoted as stating that "if in any point [human law] deflects from the law of nature, it is no longer a law but a perversion of law."[83] William Blackstone wrote that "no human laws are of any validity, if contrary to [the law of nature]."[84] Many legal philosophers, such as Austin,[85] Kelsen,[86] Hart[87] and Raz,[88] have read these statements as indicating that, for natural lawyers, moral justifiability constitutes an essential condition of legal validity. The quintessential distillation of natural law then seems to be that 'unjust law is not law.' Therefore, natural law has been interpreted as arguing that positive law is invalidated if it is morally disagreeable.[89] Hence, natural law has been typically understood as the opposite of legal positivism and these two propositions of legal validity as mutually exclusive: legal positivism maintains that whether a norm is legally valid depends on its sources, whereas natural law maintains that whether a norm is legally valid depends on its merits.

However, contemporary natural law theorists such as John Finnis reject this reading as a misunderstanding of legal positivists.[90] Finnis argues that in the aforementioned statement 'an unjust law is not law', there are two different meanings of 'law' at play.[91] The first meaning of 'law' refers to human-made, positive law, and will continue to

[83] Thomas Aquinas, *Summa Theological*, I-II q 95, a II in Thomas, (n 71), 737.
[84] William Blackstone, *Commentaries on the Laws of England Vol. 1* (Clarendon 1766), 41 in Thomas (n 71), 737.
[85] John Austin, *The Province of Jurisprudence Determined* (first published 1832, Wilfrid E Rumble ed, CUP 1995) lecture V in Thomas (n 71), 737.
[86] Hans Kelsen, 'The Natural Law Doctrine Before the Tribunal of Science' (1949) 2 The Western Political Quarterly 481, 485 in Thomas (n 71), 737; Joseph Raz, 'Kelsen's Theory of the Basic Norm' (1974) 19 American Journal of Jurisprudence 94, 100.
[87] Hart, (n 75), 208-212.
[88] Joseph Raz, *Practical Reason and Norms* (OUP 1975), 162.
[89] Thomas, (n 71), 737.
[90] John Finnis, *Natural Law and Natural Rights* (OUP 1980), 25-29.
[91] Ibid, 24.

exist as such in accordance with the principles of positive legal validity. The second use of the term 'law' means law that is morally obligatory, as all law *should* be. Although even immoral laws remain legally valid, they fail to achieve the quality of moral obligation that should be experienced in relation to law. Finnis thus separates the question of law's validity from the question of its moral justifiability. More importantly, since Finnis acknowledges that what makes a given norm *legally* valid depends on positive legal validity, sources, not its merits, he is in fact a legal positivist. If, then, legal positivists and Finnis actually do disagree, it is a second order disagreement, i.e. they disagree about what they disagree about. Legal positivists seem to believe they disagree with Finnis about the condition of legal validity of norms, whereas Finnis may be assuming that the object of disagreement pertains to law's morally obligatory force. Regardless of what exactly the disagreement between legal positivists and Finnis really is, since all these theorists assume that the condition of legal validity of norms is whether it has been established according to the proper legal procedure (source thesis), they are all positivists. Legal positivism, again, the proposition of legal validity of legal norms, has no competitor. Disagreements pertain to everything else, especially when law is authoritative/morally obligatory, which leaves legal positivism unaffected. If it is the case that Aquinas really did mean that unjust law is legally invalid, then he would be disagreeing/negating legal positivism. He would also, however, be wrong, as he would be unable to account for the condition of legal validity of norms all legal systems assume, and he would also be lacking supporters, considering the claims of contemporary natural law theorists.

Notably, it can be argued that since antiquity, it has been crystal clear that whether a norm is legally valid is separate from its moral force. Without needing to overstress this point, I will mention only one example: Antigone. In this Greek tragedy, Antigone attempts to secure a respectable burial for her brother Polynices. The law – Creon's law that was legally valid at that point in time – forbids mourning for Polynices. When Antigone is brought before Creon, she admits that she knew of Creon's law, yet she chose to break it, claiming the superiority of divine law over human law, in other words, natural law over positive law. Three points are clear. First, there is no doubt that the legally valid norm is Creon's law prohibiting the burial. Second, the legal validity of the norm depends entirely on its sources, in this case the fact that it has been laid down by Creon, not its merits; thus, the fact that the law is immoral does not affect its legal

validity (nor its enforcement for that matter). Third, Antigone is guided by real reasons for action, not by legal validity. The question she is asking is not about conditions of legal validity, but a very different one: what must she do? Should she bury her brother, thus obeying the legally valid norm and breach her moral obligation to bury her brother? Or must she fulfil her moral duty and violate an immoral law, at the cost of her life? To balance these reasons, she must consider philosophical questions the answer of which define her character and moral status: is satisfying this moral duty worth dying for? Is life worth it if she cannot satisfy certain moral obligations? Antigone, choosing to satisfy her moral obligation is buried alive in a tomb. The choice she made was not determined by legal validity, but on reasoning on the balancing of real reasons for action – moral reason (she ought to bury her brother) vs prudential reasons of self-interest (burying her brother would lead to death penalty). It seems quite clear that even in ancient legal systems, legal validity and moral justifiability have been distinct. Whether a norm is legally valid does not depend on its merits. This distinction is inherent in the nature of law.

Where does the discussion between legal positivism and natural law theory lead us in terms of 'legal legitimacy'? If natural law is what Finnis claims it is, it assumes legal positivism, because it accepts the proposition of validity of legal norms (sources), so legal legitimacy collapses to legal validity. If, on the other hand, natural law is what the positivists understand it to be, i.e. the condition of legal validity of norms is their merits, then legal legitimacy would be again, legal validity, but that would consist on merits, so it would collapse to legitimacy, or at least certain normative conceptions of legitimacy. The 'bad law is not law' understanding of natural law would conflate legal validity with merits of the law, opening the Pandora's box of all kinds of conceptual confusions. Without needing to elaborate on this point, it is worth noting that the unattainability of this understanding of natural law becomes evident from its inability to explain the legal validity of immoral legal norms and legal orders (bad law), such as the 18th century US legal order which provided for slavery (and all, or almost all ancient legal orders for that matter). Legal legitimacy, assuming natural law, collapses either to legal validity or to legitimacy.

One element attributed to 'legal legitimacy' that does not actually refer to legal validity is that it provides exclusionary reason for compliance, even in the face of opposing

moral considerations.[92] When discussing legal positivism, we already discussed that the proposition of legal validity establishes the condition for legal validity of norms (sources), but the proposition is not action guiding in any sense. Legal positivism does not tell us what to do nor does it give us reason in favour or against a certain action or omission. If a norm is legally valid, there is a *legal* obligation to obey it. This legal reason lies in the tautological redundancy of legal positivism: not abiding merely means that I breached a legal obligation and there is a legal ought for the legal consequences, as prescribed by the law, to apply. Whether the consequences will in fact apply or not is a matter of fact, not law. I may have a legal obligation to vote because it is stipulated in a legal clause, but as a matter of consistent practice, the state may do nothing to citizens who do not vote. Legally speaking, I have a legal obligation to vote. This legal reason may or may not enter my deliberation as to whether I will vote or not. When deliberating whether to vote or not, I am considering *actual* reasons, such as prudential reasons/reasons of self-interest, moral reasons, etc. These are action guiding reasons, reasons for action, not legal reasons. The exclusionary reasons mentioned are not legal reasons, but action guiding reasons, reasons that actually direct the subject to act, to comply with the law. These action guiding reasons for compliance referred to are Raz's exclusionary reasons, to which I shall now turn. As we shall see, Raz does not present a concept of 'legal legitimacy' as distinct from legitimacy. Exclusionary reasons for compliance are reasons deriving not from a so-called concept of 'legal legitimacy' but from Raz's (legitimate) 'authority', which is, together with legality/legal validity, an important neighbouring concept of legitimacy.

3.2.2. Legitimacy and Authority

The concepts of legitimacy and authority often go hand in hand[93] and not without a reason. As explained at the introduction, in order to understand, in a process of conceptual analysis, the concept of legitimacy, neighbouring concepts ought to be defined and so their relationship with legitimacy. As already discussed, a prevalent view understands legitimacy to be not moral power, but moral claim right that entails a

[92] Thomas, (n 71), 735: 'Legal validity in itself is then treated as a relatively straightforward concept. It is nonetheless recognized that legal legitimacy is particularly important because of the strength of its self-justification in a functioning legal system; once something has become legally legitimate, this provides an exclusionary reason for compliance even in the face of opposing moral considerations.'

[93] See, e.g. Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53 International Organization 379-408.

correlative moral obligation. If authority means morally obligatory directives, then there is a significant overlap with the concept of legitimacy to the extent that it is hard to see any difference, making one wonder why one of them is not redundant. Having clarified that legitimacy is moral power, I will now proceed to discuss the concept of authority and thus crystallize the relationship between legitimacy and authority. First, I will discuss exclusionary reasons for action and illustrate how Raz connects them with legitimate authority. Then, I will discuss authority and crystallize the distinction between authority and legitimacy, two concepts which, when correctly understood, are neighbouring and connected, yet distinct.

3.2.2.1. Exclusionary Reasons

I will begin by explaining exclusionary reasons which, as mentioned, do not pertain to a so-called concept of 'legal legitimacy', but to legitimate authority. Exclusionary reasons are second-order reasons to refrain from acting for some reason. Second-order reasons are any reasons to act for a reason or to refrain from acting for a reason.[94] In other words, exclusionary reasons exclude certain reasons from deliberation. In order to elaborate on this important point, an explanation on conflict of reasons is necessary.

Raz correctly understands that reasons for action have a dimension of strength, or weight. Indeed, some reasons are stronger or weightier than others. Thus, in cases of conflict of reasons, stronger reasons override the weaker.[95] For example, a driver is deliberating whether to speed up on the highway. If he speeds up, he will enjoy driving more, but he will put in danger his and other drivers' life. His pleasure of driving faster is a reason for him to speed up, whereas endangering his and other people's life is a reason for him to maintain the same speed. Both these reasons are first-order reasons, i.e. reasons for action, reasons that push toward a specific behaviour, course of action. These reasons do not relate to other reasons, but to the behaviour they are reasons for. When reasons of the same type, such as these first-order reasons, conflict, the conflict is

[94] Raz, (n 88) 39.

[95] Ibid, 25 and 35. Raz here also clarifies that the strength of reasons with which are concerned in this discussion is the logical, not the phenomenological strength. The latter is the strength the person *believes* the reason has, which though in all actuality plays a critical role to how fallible human beings eventually act, it is irrelevant to this discussion, and probably appropriately explored in the field of psychology which aims at analyzing human behavior and mind.

resolved by the relative strength of the conflicting reasons.[96] The relative strength of reasons is weighed in the balancing of reasons. The heavier, stronger, weightier reason trumps the weaker one. In this example, the driver is deliberating which reason is 'heavier', his satisfaction or safety. If the former, he speeds up, if the latter, he maintains the same speed. In such cases, we act based on the balance of first order reasons.[97] This is an example of first-order conflicts.[98]

Apart from first-order conflicts, there are two more kinds of conflicts. The one is conflicts between certain second-order reasons (exclusionary reasons) and first-order reasons. This is the kind of conflict that interests us the most here and will be exemplified in the next paragraph. The third and last kind of conflict is between second-order reasons. Second-order reasons do not pertain directly to behaviour, action, like first-order reasons, but to other reasons. Such conflicts are between a reason to act for a certain reason and an exclusionary reason to refrain from acting from it. Like first-order conflicts, second-order conflicts turn on the strength of the conflicting reasons involved.[99] Here is an example: John, a young boy, realizes that there is a reason to wear his jacket, i.e. it is cold outside. This is a first-order reason because it is reason for action. However, there is also a (first-order) reason to not wear his jacket, i.e. he feels it does not look good on him and other children may laugh at him at school. His mother (legitimate authority), tells him to wear the jacket. That is a second-order reason, i.e. reason to act on a reason: wear the jacket because mom said so, and mom saying so is a reason to not decide on the balance of reasons for action. Suppose his father tells him to listen to his mother. This is positive second-order reason, i.e. reason to act on a reason, because acting on mother's instruction is a reason. Now suppose that father tells John not to act on his mother's orders. Now John has a reason for not acting on a reason. Father's order is a negative second-order reason, i.e. exclusionary reason.[100] The

[96] Ibid, 36 and 44 '…second order reasons, which among themselves are again governed by the relation of strength.'
[97] Ibid, 37-39.
[98] Ibid, 46.
[99] Ibid, 47.
[100] Fathers' order claim seems to be a third order reason, i.e. a claim not to consider a second order reason, and conflicting second order reason would only be one where father simply says (authoritatively) that John should not wear a jacket. However, Raz does not seem to regard negative exclusionary reasons as third order reasons, though it makes sense to think of them this way. My conjecture about Raz's rationale is that the order is not to not listen to mom in general (this would be a third order reason excluding the second order reason), but to not listen to mom only in this instance, so father is essentially saying 'do not wear your jacket', contrast to the other secondary reason offered by mom ('wear your

second-order conflict here consists on mother's order ('John, wear the jacket, don't listen to your father.') with father's order ('John, don't listen to your mother.'). Both are second-order reasons, i.e. reasons of the same kind, so here, just like in first-order conflicts, the strength of conflicting reasons becomes relevant.[101]

To more deeply understand exclusionary reasons (negative second-order reasons) and their importance in the discussion, however, we must carefully examine and exemplify the second kind of conflict, i.e. conflict between exclusionary reasons and first-order reasons. The first example is Ann who is looking for a good way to invest her money. The proposed investment is complicated, and she has to decide that same evening, as the offer to make a deal will be withdrawn a midnight. Ann is aware that it may well be a very good investment right now, but there may be facts due to which the investment will not be good bargain for her later at all. She is not certain whether this proposition is better or worse compared to another one what was put to her a few days before and which she is still considering. All she requires is a few hours to examine the two propositions thoroughly. She has all the relevant information in documents in front of her. However, Ann had a long tiring day, because of which she cannot trust her judgment. She understands that she cannot make a rational decision on the merits of the case. Refusing to consider the offer is tantamount to rejecting it. An rejected the offer, not because she thinks the reasons against it override the reasons in favour of it, but because she is avoided deliberation on the balance of reasons altogether, since she cannot trust her judgement at the moment. Her emotional and mental state is not a reason for rejecting the offer because it does not establish that it would be wrong or undesirable to accept the offer. Reasons for and against the offer are first-order reasons. Ann's internal state because of which she does not trust her judgement at the moment is a second-order reason, and in particular an exclusionary reason, i.e. a reason which excludes deliberation on the balance of reasons for and against the offer. Her internal

---

jacket'). Saying only 'Do not wear your jacket' would more obviously be a conflicting second order reason. What 'Do not listen to your mom in this instance!' adds is that apart from conflicting second order reason, it is also an exclusionary second order reason: it excludes another second order reason (mother's orders). Since both parents have the same authority, what gives dad the power to exclude, via his command, mother's command? The answer is how the son, John, treats the claims. If John obeys the father and excludes mother's claim in this instance because father said so, John is treating father as an authority and his order claims as exclusionary second order reasons. Ultimately, Raz's authority depends on consciousness.

[101] Joseph Raz, 'Legitimate Authority' in *The Authority of Law: Essays on Law and Morality* (OUP 1979), 16-17.

state is a reason to go to bed and rest, and a reason to not act on the balance of reasons. But do exclusionary reasons exclude *all* first-order reasons?

The answer is most certainly negative. Exclusionary reasons may exclude all or only *some* first-order reasons.[102] When exclusionary reasons do not exclude all conflicting reasons, 'one must decide what to do on the balance of the non-excluded first-order reasons, including the order itself as one prima facie reason for the performance of the ordered action.'[103] What conflicting first-order reasons could be not excluded by exclusionary reasons?

Jeremy's example can be a great illustration of reasons that are not excluded by exclusionary reasons. Jeremy is serving in the army. He is ordered by his commanding officer to appropriate and use a van that belongs to a tradesman. Thus, Jeremy has a reason to appropriate the van. However, his friend urges him to disobey the order because there are weightier reasons to do so. Indeed, on the balance of first-order reasons, Jeremy ought to not appropriate the van. Jeremy understands this. However, he claims, it does not matter whether his friend is right or not, because orders are orders and they have to obeyed even if wrong, even if no harm will come from disobeying them. Jeremy understands that being subordinate consists in not deciding what is best. He sees what is best in the balance of reasons but he understands he is not justified in following it and he appropriates the van as ordered.[104] So far, the example illustrates the point we already covered, i.e. exclusionary reasons excluding deliberation on the balance on first order reasons. There is one important caveat in the example, however, which Raz mentions briefly and which needs to be stressed: "He admits that if he were ordered to commit an atrocity he should refuse."[105] Not performing an action because it is horrendous, morally impermissible, is a negative firs-order reason, i.e. reason for not performing an action. This first-order reason conflicts with the second-order reason of the commander's order. However, one is not justified, *all* reasons considered to perform a horrendous crime because he was ordered to do so. This is exactly what makes ordinary people who were engaged in performing atrocities as ordered by Nazi

[102] Raz, (n 88), 46 'An exclusionary reason may exclude all or only a certain class of first-order reasons.' and Raz, (n 101), 22: 'Exclusionary reasons may exclude action for all or only for some kinds of the conflicting reasons.'
[103] Raz, (n 101), 22.
[104] Raz, (n 88), 38.
[105] Ibid.

authorities bear some responsibility for their actions. Although they do not bear the same responsibility as the high-ranking officials giving orders for genocide to take place, they still have moral obligation to not perform certain immoral actions, even if ordered, especially if they could have done without harm to their life and security. Therefore, it is not the case that exclusionary reasons exclude all conflicting first-order reasons. If Jeremy's order consisted in an him performing an atrocity, Jeremy would not be justified in not deliberating on the balance of reasons and not performing the ordered atrocity.

In cases of orders, which reasons are then excluded and which not? Raz contributes to the answer with common sense. "There is a minimum that an order must exclude to be an order. It must at least exclude consideration of the recipient's present desires. Often orders exclude much more besides, but never do they exclude less."[106] Obviously, this does not entirely answer the question. There is no complete a priori answer. The answer to this question depends on the case. This is a practically extremely important question. It seems unreasonable to ask addressees of authority to not deliberate on the balance of first-order reasons as excluding such deliberation is what authoritative orders do, when there is no way of figuring out when addressees of law are expected to disobey orders, because of non-excluded first-order reasons. To decide whether a reason is excluded by exclusionary reasons or not, one must do what exclusionary reasons exclude him from doing: deliberate on the balance of first-order reasons.[107] However, this question is not a weakness of Raz's theory, because the theory does not aim at telling the addressees of authority what to do, but to explain when authority obtains. We will see soon further on how exclusionary reasons relate to authority.

[106] Raz, (n 101), 23.

[107] It seems to me that Simmonds would be in line with this. In Nigel E Simmonds, *Central Issues in Jurisprudence* (5th edn, Sweet & Maxwell 2018), 281-283, he claims that reasons are not divided by nature to different kinds, so the distinction between 'kind' and 'weight' is not helpful, 'and it is always open to us to regard more weighty countervailing reasons as different 'in kind' from less weighty reasons.' If the reason why I cannot meet you at the pub as I promised is that I had an accident and I am at the hospital with crunches, a reason which belongs to a category of reasons my promise is supposed to exclude/outweigh, i.e. reasons of personal convenience, it seems that whenever my reasons for not going to the pub are sufficient to outweigh the reasons created by my promise, the reasons are regarded of belonging to a different 'kind'.

Therefore, the claim that legal validity provides exclusionary reason for compliance, even in the face of opposing moral considerations[108] needs to be corrected in two ways. Not only, as explained above, it is not legal validity that grants reasons for action/compliance (as we shall see soon below, authority grants these reasons), but also exclusionary reasons do not exclude all moral considerations. Exclusionary reasons may exclude all or only some considerations, with moral obligations being an example of non-excluded reasons.

Where does this point in the discussion leave us in terms of the so-called 'legal legitimacy'? It has become clear that exclusionary reasons are called this way because they exclude deliberation on the balance of at least some first-order reasons. Which concept, however, are exclusionary reasons provided by and how exactly do they relate to it? I will now illustrate, continuing on Raz, that exclusionary reasons are not provided by a so-called concept of 'legal legitimacy' but by the concept of authority.

3.2.2.2. Authority

According to Raz, legitimate authority arises when an authority's addressees are better off from acting on the basis of the exclusionary or pre-emptive reasons than by identifying their own reasons for acting:

> [T]he normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[109]

According to Raz's 'service' theory of authority, people experience authority when they treat the directions or instructions given by those in authority as reasons that remove the need to decide for themselves how they ought to act (exclusionary or pre-emptive reasons). Bodies claim authority when they require their addressees to treat their directions as reasons for action in place of any reasons those persons might otherwise have had for their actions. The contrast here is between being told what we ought to do

[108] Thomas, (n 71), 735. See note 83.
[109] Joseph Raz, 'Authority and Justification' (1985) 14 Philosophy & Public Affairs 3, 18-19.

and deciding for ourselves what we ought to do.

Raz's authority is clearly illustrated with a doctor example. The examples here will obviously resemble the examples mentioned above on exclusionary reasons, but the difference is that here authority will become clear. A patient visits the doctor, and the doctor exercises authority. What makes a doctor a legitimate authority on medical matters is his education and skill. However, the reason why the doctor exercises authority in a specific instance with the patient is not because of his background per se, but specifically because the patient treats the doctor's instructions as reasons for the patient's actions. The doctor's instructions serve the purpose of providing reasons for action for the patient, thus 'service' theory of authority. If the patient insists in deciding by himself/herself what to do, e.g. by taking the doctor's instructions as mere suggestions and searching for answers elsewhere either from other doctors or reliable lay people such as family and friends, this would be a failure of authority because the patient is not taking the doctors' suggestions as reasons for action. In other words, doctor's instructions have not pre-empted other considerations (thus, 'pre-emptive reasons'). Experiencing authority consists on not deciding for ourselves. Other people's directions, the ones in authority, become our reasons for actions, replacing our own reasons for action.

Therefore, Raz's theory of authority involves identifying two kinds of reasons for action. First, deliberative reasons are considered into making a decision and giving a direction. In the doctor example, the deliberative reasons would be all the factors that contribute to the doctor's deliberation when trying to identify the disease from its symptoms, such as considering all the possible diseases which could be harming the patient, calculating the likelihood of each, etc. After the deliberation stage, the doctor, having concluded what the disease is, replaces deliberative reasons with executory reasons that tell the patient what to do e.g. take an aspirin, take some rest, etc. One type of reasoning replaces another. The person who exercises authority always takes the addressee (the person to whom authority is exercised on) from deliberative reasoning to executory reasoning. When the doctor is telling the patient what to do, the doctor does not repeat all the factors he took into account, such as all the medical knowledge he is drawing on and all the calculations he has made, but he is merely telling the patient what to do, which is an executory reasoning, which replaces the deliberations. Indeed,

people who experience authority experience executory reasons. They do not receive the deliberation of the person who is exercising authority and they do not continue deliberating themselves, so there is a double displacement here.

A more legally relevant example is in place: the parliament. Statutes passed by the parliament are like the doctor's instructions. Members of the parliament deliberate, considering their place in the polls, their power and success, the common good, they discuss issues with experts and try to work out what is best for the national interest and then they pass a statute. The statute with its rules replaces the deliberations that led to those rules and thus we treat statutes as authorities. Raz is identifying that if we really treat statutes as legal authorities, we take them as reasons for action which replace the deliberations that led to them. We cannot treat a statute as an authority if we insist on reworking all the reasons that led to that statute in that form. If we were treating statutes in that manner, they would not operate as authorities because they would not tell us what to do; in such a case, they would 'try' but they would fail to tell us what to do. We would not be treating the parliament as an authority if we did not treat the statute as something that displaces all the deliberation that lead to it. Interestingly enough, this point tells us something about separation of powers. Judges who apply the law have to treat the statutes as displacing the politics and all the deliberations that led to the law. Reopening the whole policy debate would consist on not treating statutes as authority and not treating the parliament as having authority. If law is authoritative, it excludes certain considerations and grants reasons for compliance.

A comparison and contrast between these two examples sheds light in the concept of authority and reasons for action. The doctor example is an example of epistemic authority. The doctor does not make it so that the aspirin cures patient's disease. The doctor does not manufacture the aspirin on the spot. The doctor happens to know what the disease is and how it ought to be cured and the addressee of authority, i.e. the patient, uses the doctor as a reliable way of reaching knowledge (what the disease is and how it ought to be cured). What is authoritative here is the way of reaching knowledge, the doctor, so doctor's authority is epistemic authority. By contrast, the parliament makes a written document statute, and courts, by following it regardless of deliberative reasons, treat it as authority. The normativity of authority of the doctor is content dependent because it depends on doctor's knowledge (justified true belief), whereas the

normativity of authority of the parliament is content independent: courts treat it as authoritative because the legal rule in question was established by the parliament, regardless of it's content. In both cases, because of authority, deliberative reasons are excluded. As we concluded, if law is authoritative, it excludes certain considerations and grants reasons for compliance.

An instance where authority does not obtain is when the deliberation process was not performed properly. Suppose, in the previous example, that a lay person pretended to be a doctor. Since he/she has no medical knowledge, he/she has no authority as doctor and the directives are not authoritative. This is just one instance of directives being not authoritative because the deliberation process was not performed properly. An error in the deliberation process may still occur even if the appropriate people perform the process. Suppose that the addressee is exceeding the speed limit because he believes that the legislator has been overly concerned about the possibility of an accident. In this case, the addressee is engaging with considerations that the legislator was meant to consider in establishing this directive. If it is the case that the legislator indeed considered all the relevant reasons and did so properly and thus decided the specific speed limit, then the addressee is better to comply with reasons considered by the authority by complying with authority, rather than by following reasons which apply to him directly – the law is authoritative and the addressee ought to comply with the law. If it is the case that the legislator performed an error in the process, then the addressee is not likely better following the directives of the legislator and the law is not authoritative. The Nazis may have had able law makers, but given holocaust-related laws, it is safe to say that the deliberative process was not performed properly, so the law, albeit legally valid, was not authoritative; it did not grant moral reasons for action. If Jeremy, in our previous example, is ordered by his commanding officer to commit an atrocity, the order, even if legally valid, is not authoritative because of the error in the deliberation process; no exclusionary reason excludes the moral obligation to refrain from performing atrocities.

Deliberative reasons then, lead to executory reasons which lead to Raz's pre-emption thesis: 'the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what

to do, but should exclude and take the place of some of them.'[110] Two observations have to be noted here. First, authority then requires performance of an action. Authority *is* the reason for its performance. Hence, law being authoritative does not mean obeying the law, but obeying the law *because* it is law. In the previous examples, treating the doctor as an authority is not complying with his instructions because someone else told the addressee so, but *because* he/she is a doctor. Treating the parliamentary statues as authoritative means complying with them *because* they are parliamentary statues. Treating the speed limit traffic rule as authoritative directive means complying with it *because* it is a traffic rule. Second, *some* reasons are preempted. (As we said above, exclusionary reasons may exclude all or some conflicting first-order reasons). The reasons that are preempted are the deliberative reasons mentioned above, also called 'background reasons', i.e. the reasons that the authority was meant to consider in issuing the directives.[111] "The function of authorities is to improve our conformity with those background reasons by making us try to follow their instructions rather than the background reasons."[112]

That said, if, although the background reasons were preempted, the addressee does not comply with the law because of other overriding conflicting reasons, then the direct of the law in this instance is not authoritative, because 'authority's directives must be capable of changing what we ought to do, *all things considered*'.[113] Suppose, in our driving example, that the addressee exceeds the speed limit to take his heavily injured friend who is bleeding and may die any moment to the hospital, while visibility in the road and the overall driving conditions are excellent, there is no one else in the road and in general the addressee is not endangering his/her security or others. The reason of the addressee to violate the law is not a background reason. His reason, take the heavily injured friend at the hospital as quickly as possible, is not preempted and the addressee has an overriding moral reason to exceed the speed limit. In this case, the law is not authoritative because the directive does not change what the addressee ought to do all reasons considered. The directive preempted the background reasons, but not the crucial

[110] Raz, (n 109), 13.
[111] Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003, 1019: 'their decrees should replace the background reasons. They preempt them. How much is preempted? What count background reasons? They are the reasons that the authority was meant to consider in issuing is directives.'
[112] Ibid.
[113] Ibid; the stress is mine.

reason that tipped the balance of reasons. For a directive to be authoritative, it must be capable of changing what we ought to do, *all things considered*. Raz makes it clear that that I have no reason to stop at the red light when driving in a flat country with perfect visibility, no other human being, animal or car for miles around me – even though my omission to stop is not urged by a moral obligation – simply because authoritative directions are not reasons for action in every instance. Traffic regulations may be authoritative, but there are instances where it is obvious on the merits of the case that authority of the directive does not obtain.[114]

When authority *does* obtain, what then really happens; what is authority and where does this leave us with 'legal legitimacy'? When the directive is authoritative, exclusionary or pre-emptive reasons exclude conflicting first-order reasons for action. Authority, via exclusionary reasons, is reason for compliance with the law. Exclusionary reasons are granted by legitimate authority, not be a so-called 'legal legitimacy'. Since authority connects with compliance via reasons, i.e. by changing the reasons for action of the addressees, 'Authority is ability to change reasons.'[115]

3.2.2.3. Relationship Between Authority and Legitimacy

How then does authority differ, if it does, from legitimacy? As per Applbaum (previous chapter), legitimacy is moral power, in the sense of second-order liberty rights, i.e. liberty rights regarding the modification of first order rights (claim rights and liberty rights). Legitimacy changes the normative relationships of the addressee. Authority is the ability to change reasons. By doing so, it may impact normative relationships. Authority is the ability to change reasons and can thus change normative relationships. How do they differ?

First of all, as concepts they have different content outside the legal realm. One of the reasons why the trichotomy of legitimacy is important s because it ensures we do not lose sight of the broader meaning of the concept when connected with legally relevant objects. The meaning of legitimacy in Tier 1, the most abstract level, is a vague standard of properness. This is not the case with the concept of authority. To say that a doctor is an authority in cancer research refers to his expertise and reasons to follow his

[114] Raz, (n 101), 16, 24, 25.
[115] Ibid, 19.

suggestions, but not to a sense of properness per se. As mentioned in the first chapter, one could state that an argument is legitimate, whereas describing it as authoritative would have an entirely different meaning.

Second, in relation to law, authority may mean power in an entirely different sense than legitimacy. Legitimacy is moral power, i.e. the ability to change first order rights. Authority can consist in power in the sense of actual influence on people's lives. Apart from legitimate authority, Raz correctly states that there is effective, de facto authority that consists in power, together with the claim to legitimate authority. At this point, it must be stressed that Raz makes the point that all legal systems *claim* legitimate authority.[116] All legal systems claim to decide things better than what their subjects would decide by themselves. This is the basis of their exclusionary reasons. The doctor claims authority because it is better we do what he/she says than us deciding ourselves. Law similarly claims legitimate authority because it presents itself as the appropriate way for people to behave. Laws that are not authoritative are presented to the addressees in the same manner as authoritative laws, thus making the same claim: to be obeyed. Legal systems present themselves as telling their subjects what to do and claiming that the subjects should do what they are told and that is better for the society. Although legal systems present themselves this way, this is not always necessarily true. Whether the addressees of law are indeed better to conform with the law or deliberate by themselves is, in any given situation, a matter of fact, not a matter of law. For example, a legal system may be largely the result of funding of one political party. The Nazi legal order claimed that it is best for the society if people behave the way that legal order demanded, e.g. the Nazi legal order claimed that it is better for the society if all citizens refrain from hiding Jews. The North Korean regime claims that it is best for the society if they do not escape from the country, remain loyal to their political ruler and refrain from any allegiance with the US. All these illegitimate legal orders claim legitimate authority as much as legitimate legal orders do. According to Raz, law, via its directives, does not just tell us what to do, but it also claims it is for our own good, regardless of whether its directives are authoritative or not. Apart from illegitimate yet legally valid legal orders, example of effective or de fact authority is a regime that is both illegal and illegitimate. The so-called 'Turkish Republic of Northern Cyprus', a

[116] Ibid, 9.

regime recognized as illegal by legally binding UNSC resolutions as it occupies land of the Republic of Cyprus, a sovereign state, after an illegal invasion by Turkey, is an effective or de facto authority, yet neither legal nor legitimate. It is an effective authority because it exercises actual power and influences people's fate. In addition to this, the regime presents itself as an independent state, even though it is not. It claims to be a sovereign state (legal validity) and also a legitimate one, unlike North Korea. It claims that it is best if its addressees behave according to the commands of that regime. By contrast, there is no such claim in cases where there is only brute power, "brute use of force to get one's way".[117] An individual robbing a store is using brute power and exercising, by force or threat of force, his will on people who are subjects to his commands. However, the criminal in question does not act with a claim of a right. He thus has no claim to legitimacy. This is an instance not of authority, legitimate or effective, but brute power. The concepts come close, then, in cases of legitimate authority. If both concepts change reasons, what does the one concept add to the other?

Legitimacy is obviously necessary in order to separate legitimate authority from effective or de facto authority mentioned above; but how does it do that? Note that one could not talk about effective legitimacy, as legitimacy does not pertain to power in the sense of actual force. This is another point where the trichotomy of legitimacy presented in this discussion becomes important. In 'legitimate authority,' authority brings in the issue of power (as force), whereas legitimacy brings in the issue of the appropriateness of the force to be exercised, the issue of the right. This is not a legal right, as legitimacy is distinct from legality/legal validity. This is the right as moral power, as per Applbaum. The ability to change normative relations. When saying 'authority' meaning 'legitimate authority,' the concept of legitimacy may not be stated, but it is assumed.

Further on, there seems to be one element in the concept of authority that is absent from the concept of legitimacy. When Raz discusses law as 'authority,' he makes the distinction between being an authority and having an authority.[118] 'A person is an authority if he has relatively permanent and pervasive authority over persons, that is, either authority over a large group of people or with respect to various spheres of

[117] Ibid.
[118] Ibid, 21.

activity or both.'[119] To have authority is the ability to change reasons for action with exclusionary reasons. Aside of the issue of power then, law being 'authoritative' and its directives giving reasons for action, links to the more general use of the word 'authoritative'. Like legitimacy in Tier 2 is a specification of the more abstract legitimacy in Tier 1, the vague standard of properness, law being authoritative (in the instances when it actually is authoritative) is a specification of the more general use of the term 'authority' in English language. We think through language and in this point of the discussion, words are important. The aforementioned example of a doctor is successful also because it indicates that connection of 'law being authoritative' with the more general use of 'authoritative' in English language. Doctor's directives are authoritative, on the grounds of his medical expertise and experience. Suppose a doctor and medical researcher being an 'authority in cancer research.' What experts and lay people alike infer from this is that given the expertise of this researcher, his suggestions, even if they are not commands, grant reasons for action, in other words they give lay people good reasons to follow his suggestions about combating cancer. The addressees of the suggestions of this researcher, medical practitioners and lay people alike, are better off following the suggestions of this researcher because he/she is an authority on the subject, rather than acting on their own reasons. Addressees conform better with reasons following the doctor's instructions than their own. Admittedly, this issue of expertise relates to the appropriateness in legitimacy. The expertise of the doctor and the legislator make their commands appropriate to be followed by the addressees. However, authority specifies this: the reason of complying is conforming with reason. This service conception is absent from the concept of legitimacy, though theoretically it could be part of the conception of it.

Finally, it is legitimate (!!!) to use the word 'authority' to refer to a different concept: legal competence. Authority in this sense has nothing to do with law being authoritative, not with power, but with legal competence. This is a legal term we would hear in law schools on doctrinal legal subjects, not when doing philosophy of law or discussing reasons for action of compliance. The term here has legal meaning and does not relate to actual reasons for action, whether these are prudential, moral, etc. Instances of authority as legal competence are the following: 'The police officers in the UK have

[119] Ibid, 19.

the authority to arrest suspects.' Assuming the previous meaning in the word 'authority' would not be wrong: the police officer, exercising legitimate authority, issues authoritative commands and the suspect ought to comply with the commands of the police officer. Assuming the deliberation stage has been performed properly, the command gives reason for action and the suspect ought to comply. However, this is not what is meant here. What is meant in this statement is that the police officers have the legal competence to arrest suspects. We could understand 'authority' also as legitimate authority and thus understand the meaning of the sentence as being that the addressees have reasons for compliance. However, note how this would not stand if it was Nazi officers arresting whomever the Nazi laws would state as suspects. This statement is true without qualifications only in the sense of legal competences. It is in the sense of legal competences that both the legitimate UK police officer and the illegitimate Nazi police officer have the authority to arrest suspects. Authority as legal competence pertains to legality/legal validity. A final example would be the following: 'The Westminster Parliament cannot legislate on agriculture, fisheries, forestry and rural development of Wales because deciding on those matters is under the authority of the National Assembly for Wales.' A complete paraphrase would be: 'The National Assembly of Wales, not the Westminster Parliament, has the (legal) competence to pass bills on agriculture, fisheries, forestry and rural development of Wales.' Notably, in other languages, the respective term for 'authority', such as 'armodiotita' in Greek (αρμοδιότητα) has only this legal meaning, which thus avoids confusion.

We have now concluded the part of the discussion pertaining to legitimacy and surrounding concepts. We have concluded that there is no such concept as 'legal legitimacy' attempts to establish such a concept collapse either to legality/legal validity, at least by assuming legal positivism. Reasons for compliance are established by the distinct concept of authority. In the concept of legitimate authority, the concepts are intertwined, as authority contributes the issue of power, but needs legitimacy to bring in the right, necessary for legitimate authority to be distinguished from effective or de facto legitimacy. It is now time to proceed to the relationship between the concept and its individual conceptions.

3.3. Concept vs Conceptions Distinction

3.3.1. Essentially Contested Concepts

The distinction between a concept and its conceptions is not unique to legitimacy. The concept/conception distinction originated with the paper 'Essentially Contested Concepts' by the philosopher Walter Bryce Gallie in 1956.[120] Gallie makes an extremely useful distinction of two different kinds of disagreements, namely disagreements consisting on ambiguity (pseudo-disagreements) and genuine disagreements.

Ambiguity is a phenomenon in all human languages. Sometimes, disagreements regarding the application of certain concepts are not genuine disagreements, but they merely reflect ambiguity, because such words have different meanings. For example, the sense in which keeping promises is 'right' or 'good' is clearly different than the sense in which a person's informal appearance at a formal occasion is 'right' or 'good.' The first sense is a rather moral sense whereas the latter sense is rather a standard of appropriateness based on fashion, taste or something like it. This is not a conceptual matter but a matter of ambiguity of language, just like the word 'bank' in English language has two distinct meanings, namely the financial institution and the side of the river (regardless of the historical connection between the two senses). It is thus wrong to regard disagreements based on ambiguity as conceptual disagreements and we could thus call them pseudo-disagreements.

Gallie correctly observed that

> We find groups of people disagreeing about the proper use of the concepts, e.g., of art, of democracy, of the Christian tradition. When we examine the different uses of these terms and the characteristic arguments in which they figure we soon see that there is no one clearly definable general use of any of them which can be set up as the correct or standard use.[121]

Indeed, people disagree about the proper use of such concepts. A roll of toilet paper on a wooden chair would not count as 'work of art' for some people, whereas it clearly does for people responsible of selecting artefacts of certain art museums. What is the

[120] Walter Bryce Gallie, 'Essentially Contested Concepts' (1956) 56 Proceedings of the Aristotelian Society 167.
[121] Ibid, 168.

cornerstone of the Christian tradition? Some would say it is following the Bible to the letter; others would say it is love thy neighbour. These two do not always overlap and sometimes oppose each other. Gallie explains our intuition that when people disagree about the nature of certain concepts, their disagreement is not merely a linguistic confusion, but a real and genuine disagreement.

Gallie makes two relevant, yet distinct claims, with the first one building up to the latter. In his own words:

> I want to show that there are apparently endless disputes for which neither of these explanations *need* be the correct one. Further, I shall try to show that there are disputes, centred on the concepts which I have just mentioned, which are perfectly genuine: which, although not resolvable by argument of any kind, are nevertheless sustained by perfectly respectable arguments and evidence. This is what I mean by saying that there are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.[122]

Gallie's first point is that there are concepts regarding which it is not the case that from different explanations, senses, meanings of those concepts, one is necessarily the correct one. It does need to be the case that one of different conceptions of art be correct and the other false. It is not necessarily true that only one conception of a concept is correct, i.e. that each concept can have only one possible conception. A concept may have several conceptions.

The second point is that such concepts are essentially contested. It is not the case that although no conception of the concept is wrong, one conception is better argued than the others. The disputes regarding the competing conceptions are sustained by respectable arguments and evidence, yet the disputes are not resolvable by argument. It cannot be argued which conception is sustained over the others and thus which single conception is best attached to the concept. The impossibility of resolving the dispute between competing conceptions based on argument renders the concept essentially contested.

[122] Ibid, 169.

There is a prima facie contradiction here, which is actually nothing more than lack of clarity. On first glance, one could observe the following contradiction. Literally speaking, to say that 'neither of these explanations *need* be the correct one', referring to several conceptions of a concept, it is to say that it is not necessary that one conception is correct, but it could be the case that one conception is correct. This claim then, when taken literally, allows for the possibility of there being one correct conception and the others wrong. Gallie's second point negates the possibility of there being one correct conception and the others wrong because it states that the conceptions are sustained by perfectly respectable arguments and evidence, and therefore the dispute regarding which is the correct conception is endless. If there was a correct conception, the dispute would not be endless, as it would be at least theoretically possible that the discussion concludes which conception is correct. If there is a correct conception, the concept would be contested because there would still be different argued conceptions about it, but it would not be an essentially contested concept. What makes a concept essential contested as per Gallie is that the dispute between competing conceptions of a concept is 'endless' and that is 'inevitable': 'This is what I mean by saying that there are concepts which are essentially contested, concepts the proper use of which *inevitably*[123] involves *endless*[124] disputes about their proper uses on the part of their users.' If one conception is correct and the others are wrong, the dispute between them is not endless and most certainly not inevitable. Therefore, it is safe to conclude that Gallie, by 'essentially contested concepts' assumes a concept which invites for several well argued conceptions, of which none of them is correct and the others wrong. Indeed, what Gallie means by 'need' is 'entailed by the concept itself.'[125] To say that a conception of a concept is not necessarily correct is to say that it is not entailed by the concept of itself and a person who accepts a different conception of the concept is not necessarily failing to grasp the concept (although he could be because *some* conceptions could be wrong or absurd). It is important to note that 'essentially contested concepts' implies that there is no one correct conception of the concept.

A simple example is in place: equality. Suppose that there two competing conceptions of equality (there could of course be more). Some believe that equality means treating

[123] The stress is mine.
[124] The stress is mine.
[125] This point was brought to my attention by Professor Peter de Marneffe, Professor of Philosophy at Arizona State University.

everyone the same, whereas others believe that equality means treating people in such a way so that the outcome for each person is the same. This means putting things in place to support people to achieve similar outcomes. For a person who is blind it may involve having screen readers on computers and removing obstacles in the building. If it is the case that both conceptions are sustained with perfectly respectable arguments and the dispute between the two conceptions cannot be resolved by argument of any kind and it is thus inevitably endless, then equality is an essentially contested concept.

Justice could be another example. Before Rawl's famous book *A Theory of Justice*, 'justice' had a clear meaning: respecting people's rights. When one person violated another person's rights, he treated him unjustly. A person treated another person unjustly only by violating his rights. The government treated a person unjustly only by violating his rights or failing to protect them, e.g., the slaves' liberty rights. Rawls recognizes this traditional meaning of justice in passing in *A Theory of Justice*, but then goes on to use the term differently, arguing that it is sufficiently similar to the traditional meaning. But it is not. Rawls argues in *A Theory of Justice* that certain patterns of distribution are unjust. According to him, for example, it is unjust that people of equal talent and motivation should have very unequal chances of success based on differences in their parents' wealth. But this is not unjust according to the traditional conception because one person does not violate another person's rights simply in having advantages or giving their children advantages.[126] Hayek accepts the traditional understanding of justice and rejects the notions of 'social justice' and 'global justice' as fundamentally confused. If it is the case that both conceptions of justice, i.e. justice as protecting or at least not violating rights and justice as patterns of distribution, are sustained by respectable arguments and the dispute between the two conceptions cannot be resolved by argument of any kind and it is this inevitably endless, justice is an essentially contested concept.

What is the difference the between contested concepts and essentially contested concepts? In the above examples, if it is the case that one conception of equality or justice is correct because there are better arguments in its favour, and/or it is sustained by more compelling evidence, and/or there is argument which resolves the dispute

[126] This point was brought to my attention by Professor Peter de Marneffe, Professor of Philosophy at Arizona State University.

between the contesting conceptions, then that concept of equality or justice is contested, but not essentially contested. It is contested because there are different conceptions of the concept, but there is a correct conception. If, however, there is no single correct conception, there are more than one concepts which are sustained by perfectly respectable arguments and evidence, there is no argument to resolve the dispute between the contesting conceptions, and thus the dispute is inevitably endless, the concept is essentially contested. Therefore, the descriptive fact that people disagree about which conception is correct renders a concept contested; in order for the concept to be essentially contested, it also has to be the case that there is no one correct conception as was just stated, which is a matter of argumentation, not a matter of descriptive fact. 'Contested concepts' refers to a sociological fact of disagreement whereas 'essentially contested concepts' refers to the contestability of the claim when there is no one single correct conception.

3.3.2. Hart

Hart does not discuss the specific issue of essentially contested concepts, but he does draw on the concept vs conception distinction and identifies the concept with commonalities between its several conceptions. In specific pages of his famous work *The Concept of Law* which were later to be cited by Rawls, Hart maintains that there is a core abstract meaning of justice and there can be several conceptions which constitute specifications and applications of that core meaning. In particular, Hart first gives distinctive features of the application of justice. For example, he states: "That just and unjust are more specific forms of moral criticism than good and bad or right and wrong, is plain from the fact that we might intelligibly claim that a law was good because it was just, or that it was bad because it was unjust, but not that it was just because good, or unjust because bad."[127] For several instances of application, Hart settles then that justice is a subcategory of morality. "The general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality."[128] Through distinctive features and diverse applications, Hart identifies the core of the concept of justice, which is "Treat like case alike" and "treat different cases differently."[129] He correctly goes on to state that the

[127] Hart, (n 75), 158.
[128] Ibid, 159.
[129] Ibid.

vague core of the concept must be specified in order for justice to be meaningfully applied and it is in such specifications where conceptions are constituted.

> …though 'Treat cases alike and different cases differently' is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct. This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.[130]

This is exactly what can be provided only by conceptions of justice which will specify the core of the concept of justice – 'Treat cases alike and different cases differently'. The final formulation makes the concept vs conception distinction clear:

> There is therefore a certain complexity in the structure of the idea of justice. We may say that it consists of two parts: a uniform or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.[131]

For Hart, conceptions of the concept of justice are exactly the 'shifting or varying' criteria; why does this seem rather strange in comparison to our examples above? Let's recall the conceptions of justice we stated in our example above: one conception of justice is protecting or at least not violating rights (let's call it the 'traditional' conception for short) and the other is patterns of distribution (let's call this one the 'progressive' conception for short). Comparing the traditional and progressive conceptions of justice, one can see that they are not comparable - their difference is not a matter of shifting or varying criteria. Does that mean Hart is wrong?

Not necessarily. In the previous example, we defined the conceptions, not the concept, so we did not discuss what the traditional and progressive conceptions of justice are criteria *of*. If we were to find the concept of justice that the traditional and progressive conceptions are conceptions of, then it could be as well the case that these conceptions identify varying criteria of that concept. If the concept which the traditional and

[130] Ibid.
[131] Ibid, 160.

progressive conceptions are conceptions of is not the one identified by Hart, 'Treat cases alike and different cases differently', then two possibilities may be happening. The first possibility is that one of the identified concepts or both, may in fact be conceptions of a different, more abstract concept and we need to find out how it is that this concept is specified into these conceptions. Thus, it could be the case that Hart's definition of the concept of justice is in fact a conception of a more abstract concept of justice than the one Hart is stating, e.g. a vague sense of 'appropriate treatment'. One conception of appropriate treatment is protecting or at least not violating people's rights, another conception is patterns of distribution (as we mentioned above, these two have different entailments), and in a legal context, appropriate treatment is about treating cases alike and different cases differently. The second possibility is that one of the conceptions is wrong, e.g. it may be a different conception altogether, and it is wrongly expressed by the word 'justice'. If that is so, the conception most likely to be wrong from the three conceptions mentioned is obviously the progressive conception. Hayek, who regards the notions of 'social justice' and global justice' as fundamentally confused, would probably agree with this. Here, one could argue that protecting or at least not violating rights is the concept and treating cases alike and different cases differently is a more specific conception of the concept. Alternatively, both possibilities could be happening. It could be the case that the progressive conception is wrong, the concept is indeed a more abstract one, say the vague sense of 'appropriate treatment,' and the conceptions are the traditional conception one the one hand, and 'Treat cases alike and different cases differently' on the other. As we shall also see below, the boundaries between concept and conceptions may shift.

How did we move from the conceptions to identifying the concept? This is where the ladder of abstraction Hart is assuming becomes useful. If we are aware of conceptions but cannot identify the concept, we trace commonalities between the conceptions and climb the ladder of abstraction higher: what do several conceptions have in common? This is the line of reasoning that gives us the concept.

Notably, this is exactly what we did at the beginning with legitimacy. Having traced several instances of legitimacy, ranging from 'legitimate argument' to 'legitimate monarch', we asked what the commonality between all these instances is and climbed higher in the ladder of abstraction tracing the meaning of the most abstract concept of

legitimacy to a vague standard of properness. Having identified that, we started specifying this standard of properness. We ignored the instance of legitimacy in the examples of 'legitimate argument' and we focused on the instances which relate to the four objects of legal form (legal order/system, individual law, actor and action). In a sense, we identified some criteria: what does this vague properness, i.e. legitimacy, mean when it is applied in relation to the four object types of legal form?

If this scheme makes sense, legitimacy in Tier 2 is a conception, not a concept; so how/why do we call it concept? The answer is simple: like we noticed above, the distinction between a concept and conception is fluid. In terms of legitimacy in its most abstract form (Tier 1), legitimacy in relation to the four object types of legal form (Tier 2) may as well be a conception. From the point of view of legitimacy in Tier 2, normative conceptions of legitimacy which identify the necessary/sufficient conditions for legitimacy to obtain (speaking of Hart's 'varying criteria') are conceptions. The reason why in this discussion we identify legitimacy as a concept in Tier 2 is because this discussion pertains to legitimacy in relation to law (the four object types of legal form). Nothing precludes one from regarding legitimacy of Tier 2 as a conception of legitimacy, with the concept of legitimacy being the vague standard of properness in Tier 1. With legitimacy in Tier 1 being the concept, there could be more conceptions apart from the conception of legitimacy of the four object types of legal form; for example, another conception could be the one that pertains to 'legitimate argument,' a different standard of properness. That would be another Tier 2.

To conclude, Hart seems to have not discussed the issue of essentially contested concepts, but he did draw on the concept vs conception distinction. In particular, he identified the concept with commonalities between several conceptions of the concept which form the uniform or constant feature of the concept, and the conceptions which identify the criteria of when the concept applies. Soon later, Rawls was to draw on this same concept/conception distinction, referring to Hart.

3.3.3. Rawls

Perhaps the most famous use of the concept/conception distinction so far is found in John Rawls' famous book, *A Theory of Justice*. Rawls appeals to the distinction

between the concept of justice and particular conceptions of justice and defends his theory, justice as fairness, as the best conception of justice.

> Existing societies are of course seldom well-ordered in this sense, for what is just and unjust is usually in dispute. Men disagree about which principles should define the basic terms of their association. Yet we may still say, despite this disagreement, that they each have a conception of justice. That is, they understand the need for, and they are prepared to affirm, a characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation. Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common [1].[132] Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life. Men can agree to this description of just institutions since the notions of an arbitrary distinction and of a proper balance, which are included in the concept of justice, are left open for each to interpret according to the principles of justice that he accepts. These principles single out which similarities and differences among persons are relevant in determining rights and duties and they specify which division of advantages is appropriate. Clearly this distinction between the concept and the various conceptions of justice settles no important questions. It simply helps to identify the role of the principles of social justice.[133]

The first observation in relation to Hart is the difference in the context of the concept. Hart defines justice as 'Treat cases alike and different cases differently'. It is hard not to notice how differently Rawls defines the concept of justice: "a characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation." He refers to rights as the traditional definition we saw before, and then he adds the progressive definition pertaining to patterns of distribution. This difference in the definition of the concept of justice is contextual, thus not directly relevant to our purposes since our discussion pertains to legitimacy and not justice. What is, however, more important for our conversation, the number of points where Rawls follows Hart.

[132] 1. Here I follow Hart, (n 75), 155– 159.
[133] John Rawls, *A Theory of Justice* (Harvard University Press 1971), 5.

Rawls follows Hart at a couple of points. First and foremost, Rawls understands the concept as distinct from the conceptions and identifies the concept with what the conceptions have in common. Also, like Hart, making the concept vs conception distinction, Rawls discusses contested concepts, i.e. concepts in the case of which people argue for different conceptions, but not 'essentially contested concepts.' Notably, his concept/conception distinction does not imply that he believes that justice is essentially contested.

Rawls believes that justice is a contested concept, but not essentially contested. What is the difference? As we discussed above, 'contested concept' refers to the sociological fact of whether people agree on one understanding of a concept, or if they disagree thus arguing for different conceptions of a concept, while there is a correct conception, whereas 'essentially contested concept' refers to the contestability of the claim when there is no single correct conception. Rawls believes that justice is a contested concept because he believes there are several conceptions of the concept of justice, *and* he also believes that *his* conception of justice is the correct one; the latter entails that he understands justice as being a contested, yet not an essentially contested concept. He believes that it is possible in the future for the people to understand that his conception of justice is the correct one.

Before leaving Rawls, let's focus on some common ground between Gallie and Rawls. Suppose that justice is an essentially contested concept, a claim with which Rawls disagrees. Gallie says: 'I want to show that there are apparently endless disputes for which neither of these explanations need be the correct one.' Before, we explained how it is, in the light of his second claim, that he means there is no single correct conception. Rawls presumably agrees with this, i.e. that 'essentially contested concepts' means that there is no one correct conception, which is presumably why Rawls (and Dworkin as we shall soon see) regards justice as contested but not an essentially contested concept. They also agree on another point. It seems that what Gallie means by 'need' is 'logically entailed by the concept itself.'[134] To say that a conception of justice is not necessarily correct is to say that it is not entailed by the concept of justice itself and a person who accepts a different conception of justice is not necessarily failing to grasp

[134] This point has been brought to my attention by Prof. Peter de Marneffe, Professor of Philosophy at Arizona State University.

the concept. Rawls - and also Dworkin as we shall see next - would agree with this, even though they believe there is a correct conception of justice.

3.3.4. Dworkin

What has been mentioned in the last two paragraphs regarding Rawls, also applies to Dworkin.[135] Another well-known use of the concept/conception distinction is found in Ronald Dworkin's theory, *law as integrity*.

Suppose that Hercules, the hypothetical judge with whom Dworkin illustrates his theory, is interpreting the term 'cruel' in the Eighth Amendment of United States Constitution which prohibits cruel punishments. In order to do so, Hercules has to determine what conception of cruel punishment best fits and justifies the legal practices of the Eighth Amendment cases and more broadly of the whole of US constitutional law. There are several conceptions of the term 'cruel.' According to one conception, a punishment is cruel if it only involves torture. According to another conception, a punishment is cruel only if it involves the needless infliction of suffering. Assuming the former, the death penalty is not cruel. Assuming the latter, it might be, if the death penalty has no deterrent benefits. How will the Hercules judge choose which conception to employ? For Dworkin, interpretation must fit settled law (dimension of fit), including all the relevant precedents that are generally accepted by the legal community, and, if more than one interpretation does this, the judge must choose the interpretation which best results in a system of law that better protects people's (natural) rights than any alternative interpretations that fits the settled law equally well (dimension of justification).

In relation to Gallie's essentially contested concepts, Dworkin lies in the same place as Rawls. Dworkin believes that there is one single correct conception of 'cruel' punishment and he lays down the path for the judge to find it. This way, Dworkin believes the dispute between different conceptions can be resolved, it is not 'inevitably endless', in Gallie's words. It may be difficult for an actual judge, but the hypothetical Hercules judge can find the one correct conception of the concept 'cruel' punishment, via the dimensions of fit and justification. Dworkin does not regard justice as an

[135] This point has been brought to my attention by Prof. Peter de Marneffe, Professor of Philosophy at Arizona State University.

essentially contested concept, but he would regard it as contested, as people have different conceptions of it, presumably because the conception is not logically entailed by the concept itself – thus the need for the two dimensions the judge must follow. Therefore, it seems that for Dworkin 'cruel' is a contested concept because he does assume the sociological/descriptive fact that people have different conceptions about it, and it is also an interpretive concept - a concept that is subject to interpretation, but not an 'essentially contested concept.'

3.4. Legitimacy: An Essentially Contested Concept

The question which logically follows is this: is legitimacy a contested concept or an *essentially* contested concept? Having Gallie in mind, we would be inclined to understand legitimacy as an essentially contested concept, as long as there are several conceptions of legitimacy sustained by respectable arguments and evidence and no single conception is correct and the others wrong, so the dispute between different conceptions is not resolvable by argument and inevitably endless. On the other hand, having Rawls and Dworkin in mind, we would be inclined to understand legitimacy as a contested but not an essentially contested concept. It could be the case that there is one correct conception of legitimacy, despite any current disagreements. It is important to keep in mind that whether eventually, one conception of legitimacy is agreed upon is important for a concept being contested, not essentially contested. If a concept is contested, then future agreement on one conception of the concept renders the concept as no longer contested. By contrast, what renders a concept essentially contested is not the descriptive/sociological fact of disagreement but the contestability of the claim/nature of the concept, regardless of factual agreement/disagreement. Therefore, no matter how odd it may sound, in the case of an essentially contested concept, actual disagreement may cease to exist by everyone agreeing on one conception, but such an agreement will not render the concept as not essentially contested. Whether there are equally well argued conceptions or not depends on the contestability of the claim, not on the descriptive fact of whether there are people advancing such conceptions. Besides, the fact that there is a strong agreement on a claim does not render it correct; people may agree on what is wrong. For the most part of the history of mankind, humans believed that the earth is flat, and that men ought to have authority over women. Despite the overwhelming agreement, none of these claims were ever true.

The difference between contested concepts and essentially contested concepts is that in the case of the former, there is one conception which is correct, whereas in the latter there is not. In the case of contested concepts, there can be more than one conception and it may also be the case that at different points in time, most or all people come to support one. Regardless of this sociological fact, the determining characteristic of a contested concept is that one conception can be singled out as the correct one, in terms of the contestability of the claim. By contrast, in the case of essentially contested concepts, more than one conception is equally reasonable and well argued, and there is no argument which solves the dispute between such equally reasonable and well agued competing conceptions, so there is no single correct conception. The absence of argument solving the dispute between competing conceptions is not a matter of no one having thought of it yet, but a matter of logic; in other words, the lack of agreement between competing conceptions is not a contingent sociological fact, but a necessary conceptual one.[136]

How then should we answer the question of whether legitimacy is a contested or an essentially contested concept? What we must attempt to show then is whether there is one single conception which is correct, in which case legitimacy is a contested concept, or that there is no single conception which is correct, in which case legitimacy is an essentially contested concept. The former is much more difficult: one would have to consider all the conceptions of legitimacy, decide which one seems prima facie as the correct one and then try to argue why it is so. The latter seems like a much more sensible route, yet impossible: how do we prove something which does not exist (no single correct conception)? The most sensible path to follow then is to try to prove the latter, but with a different way. We can try to prove that there are at least two reasonable conceptions, and it is not the case that the one is correct and the other wrong.

[136] One could see an analogy in computer science/logic. In computability theory, the halting problem is the problem of determining, from a description of an arbitrary computer program and input, whether the program will finish running, i.e. halt, or continue to run forever. The cases where the computer program will continue running for ever are like the disagreement between competing conceptions of essentially contested concepts, which will go on forever because the absence of an argument solving the dispute between competing conceptions is a matter of logic. Essentially contested concepts could thus be, epistemologically speaking, more easily discernible than the instances where the computer program will continue to run for ever, though that is a different point.

3.4.1. Essential Contestability Dependent on Facts

Although concepts like art make good examples of essentially contested concepts, in legally relevant objects, some convincing illustrations of legitimacy being an essentially contested concept pertain to instances where the standard of legitimacy depends not on fixed a priori criteria, at least not entirely, but at least partly on the context, on the facts.[137] Facts can give grounds for equally well argued conceptions of legitimacy which, in the absence of an independent argument solving the dispute between them, render legitimacy an essentially contested concept. This is obviously more likely to happen when the object of legitimacy is an action or an entity instead of a legal order or an individual legal norm. A category of actions where the essential contestability of the concept of legitimacy is brought to obvious light is certain hard choices. Suppose that a state has been invaded and it thus has the right to defend itself. Because of corruption, many politicians are unwilling to do so and also convince a large portion of the people that standing down is the best choice. Therefore, the democratic mandate clearly requests no defensive war to be taken. It also happens to be the case that the head of the government can lead the country to a defensive war with reasonable chances of success, but only by violating both the democratic mandate and also specific constitutional procedural rules regarding leading the country to war. Therefore, leading the country to war is obviously illegal. The question is, would it be legitimate? The head of the state, who has sworn to protect his country and obey its laws is confronted with the following dilemma: either he leads the country to a liberation war but violates the law of the country and its democratic mandate, or he does not go to war, thus complying with the laws of the state and the democratic mandate but fails to protect the country even though he could.

Presumably, both protecting the country on the one hand, and on the other hand respecting the democratic mandate and the laws of the country should be part of the standard of legitimacy here. When these two come apart, different prioritisation of the two will yield two different standards: if the conception of legitimacy prioritizes protecting the country over obeying the democratic mandate and the laws of the country, then going to war is legitimate and not going to war is illegitimate. If, on the other hand, the conception of legitimacy prioritizes obeying the democratic mandate

[137] As we shall see towards the end of the discussion, this is compatible with Buchanan's Metacoordination view.

and the laws of the country instead of actually protecting the country, then not going to war is legitimate and going to war is illegitimate. A first reaction would be that the duty to protect the country is to be understood within the context of the legal system and thus cannot include the idea of protecting the country in violation of its laws. However, since the point at issue is not legality but legitimacy, it is hard not to see a valid moral reason to violate legal norms to protect a country when being the person who has sworn to protect it. Both arguments obeying the democratic mandate and the law on the one hand and protecting the country on the other are equally well argued and render legitimacy an essentially contested concept.

The reason why the legitimacy of this action is an essentially contested concept is actually quite simple. On first glance, the choice seems to resemble the typical choice of 'do I obey morality or the law.' The answer to this question is obvious, given that whether a rule is legally valid depends on its sources, not its merits, so legal validity does not entail moral validity (legal positivism). However, on a more careful consideration, the dilemma in this example is quite different. The head of the state has *sworn* to both protect the state one the one hand, *and* obey its laws on the other. He has sworn two things which, in this specific circumstance, happen to be mutually exclusive. Given the facts of this instance, protecting the country entails violating the law and obeying the law entails not protecting the country. The choice is between acting as a patriot vs acting as a citizen/man of authority. The former refers to our status as human beings with specific identity (such as ethnic identity), whereas the latter refers to our legal status as members of a legal order. These two are distinct because they are different aspects which do not communicate. The one refers to the actual world, the other to the legal realm. It makes sense to act as human agents rather than legal agents (it is better to quit your profession as a judge if, because of a sudden regime change, you have the legal obligation to apply morally horrendous laws), only that in this case, the head of state has sworn to both, so he has the same reason to act in accordance with either normative system. As a patriot, he ought to defend his country and violate the law. As a citizen/man of authority, he ought to uphold the law. However, since, regardless of our several roles, each human being is one entity, at any given point in time, it is possible to only apply one normative system in each choice. As Christoph Kletzer has correctly pointed out, there can only be one continuous normative system; law and morality cannot be part of one normative system, so they cannot be valid

simultaneously; we can switch back and forth between law and morality, but what we cannot do is take both at the same time.[138] Of course our head of state in the example above can decide to save his country no matter what because that is what matters the most (saving the country has greater value – value theory), but that does not mean legitimacy here is not essentially contested. Of course, as an agent, the head of state will make a choice (given the facts, 'not making a choice', i.e. not doing anything, is making the choice of obeying the law and letting the country defenceless) but not dependent on legitimacy, because since here legitimacy is essentially contested, how it changes normative relations depends on the conception the agent chooses. The agent will choose between competing conceptions based on his individual beliefs, circumstances, values, such as protecting the country, etc., and choice of any of these well argued conceptions is equally valid exactly because there is no argument within legitimacy to solve the dispute between the two conceptions. This is exactly what renders legitimacy essentially contested. Freedom of country or upholding the law is a choice the human agent will make in accordance to what is more important for him, but there is no independent argument in solving the dispute between the two conceptions as they rise from the circumstances. Therefore, in this example, because of the facts/circumstances, legitimacy is rendered an essentially contested concept.

A recent action which makes a great example of the normative conception of legitimacy best being identified in the light of specific facts/circumstances is the referendum in the UK regarding the exit of the UK from the EU in 2016. Regardless of the opinion one holds regarding whether the UK should remain in the EU or exit, the prevalent view is that the referendum was legitimate because democratic majority rules and the proper procedure were followed, people were not only in law but also in fact free to voice their opinions and cast their vote, etc. This is the prevalent conception of legitimacy of the referendum. However, it can also be well argued that the referendum was clearly illegitimate[139] because of a conception which arises from the specifics of this particular circumstance: the voters were asked a binary question, yet they were informed of only the one answer. The voters know what 'remain in the EU' means. However, they could not have possibly known what 'leaving the EU' entails because the Brexit deal had not

[138] Christoph Kletzer, 'The Normative Jinx' (2017) 37 Oxford Journal of Legal Studies 798, especially 808 and 813.
[139] It is extremely important to note that, in this discussion, I take no stance as to the Brexit question or the result of the referendum, nor is the answer to this question important for or relevant to the argument.

been negotiated. A legitimate referendum with this question would entail negotiation of the Brexit *first*, so that people are aware of both options: they ought to know what happens if the UK remains in the EU, just as what happens if the UK leaves the EU. Asking a binary question when only one answer is known is not proper - it is not legitimate. According to this conception, if a referendum consists on a binary question, both answers have to be known. This conception of legitimacy is not an a priori criterion but it rose from the particularity of the specific facts. In the absence of an independent argument solving the dispute between the two conceptions, legitimacy of this referendum is an essentially contested concept.

The other important point arising from this example is that legitimacy as a concept is too open ended to not be an essentially contested concept. This is because the content of legitimacy, as explained above, is determined by normative conceptions, not the concept of legitimacy per se. A normative conception of legitimacy of referendum would probably include certain established a priori conditions such as appropriate minimum turnout, guarantees for voters to express their opinions and vote free from fear or threats, etc. Such conditions would be necessary conditions of legitimacy. What the Brexit referendum example showed, is that although it is easy to identify certain necessary conditions of the standard/conception of legitimacy, it is extremely difficult, maybe even impossible considering the unpredictability of future circumstances, to provide an exhaustive list of a priori *sufficient* conditions of legitimacy. A conception of legitimacy has to do both: identify both the necessary *and* sufficient conditions of legitimacy. The condition of legitimacy which is relevant, as I demonstrated before, was whether voters have been informed about details of both potential answers of the referendum question, when it happens to be a binary question. This is not immediately obvious as the aforementioned necessary conditions imply. Each question that could be asked is different and different questions may pose different kinds of issues which call for different response(s) being appropriate, thus different conception(s) of legitimacy. The nature of the specific object of legitimacy and the broader context determines the appropriate conditions of the conception of legitimacy. Therefore in many cases, the sufficient conditions, and thus the appropriate conceptions, are identified in the light of the specific circumstances.

3.4.2. Change of Circumstances: Does Time Legitimize?

What brings about change of circumstances is, in one word, time. Legitimacy can be essentially contested with competing conceptions pertaining to the element of time. For sure, time legitimizes in the descriptive sense. For example, imagine the parents of a girl who has been brutally murdered. At the time recent to the event, there is a sentiment of eagerness for strong punishment of the perpetrator, even hatred. The perpetrator is presented as the manifestation of all evil and barely any punishment is enough. Trends not even particularly relevant, such as feminism, are brought in the agenda and people generally invoke any possible justification to present the perpetrator as the manifestation of all evil. The overall sentiment is in favour of very strict sentence in the context of despise and hatred towards the perpetrator. Suppose that the perpetrator is not found at any time recent to the crime. Several years later, people not only gradually cease to show sympathy for the strong negative feelings of the parents towards the perpetrator and the intense emotional responses towards him, not only people start telling the parents that it is 'time to let go,' 'move on,' etc., even though the perpetrator has not been punished, but people also change emotional stance towards the perpetrator. For sure, murder as such remains a horrible crime in the minds of the people, but the emotional stance towards the specific perpetrator and his act in particular has changed: 'It is an old story.', 'It belongs in the past.' Suppose the perpetrator has been arrested when this emotional stance is now prevalent. The sentiment of the people could be in favour of a different sentence than before. The same sentence could be regarded now as illegitimate because it is perceived as manifestation of hatred of the parents who 'did not move on' and 'cannot let go.' The inconsistency in the beliefs of the people regarding the sentence lies on the fact that time is morally irrelevant. Leaving aside legal reasons which may influence the sentence because of time, it is morally irrelevant whether someone committed a murder yesterday or several years ago. The violation of a moral obligation and in that sense moral blameworthiness is not dependent on time. This is normative. Yet, descriptively, time legitimizes.

The same is true in the international realm. States may be legal entities, but they are administered by human beings, just like the human beings in the previous example with inconsistent beliefs regarding criminal punishment. Suppose state A invades and occupies part of state B. The UN general Assembly issues resolutions regarding the illegality of the invasion and asks from the invading state to withdraw its military troops. Suppose that after the invasion there are no military operations or fighting

whatsoever, so there is peace, even though the status quo is unjust. Even after some time, the overall sentiment in the international system is probably against the invading power and in favour of breaking peace for liberation. Suppose that, because of political interests, the international community does not take military measures to expel state A from the territory of state B. Suppose that state A not only keeps its military forces in that territory, but also brings migrants from state A to the illegally occupied areas of state B, sells land of citizens of state A in the occupied areas, changes not only the demographics but also the cultural property of the occupied area, such as religious monuments, and declares the occupied area as an independent state which only state A, the invading state, recognizes. Leaving aside the illegality of both the invasion and the declaration of independence (suppose that the UN Security Council declares, with legally binding resolutions, the occupied area as a non-state but an illegal regime, as it occupies territory of a state), consider again how time legitimizes. The international community is no longer trying to restore justice but asks state B, the invaded state, the same thing people would ask the parents of the victim in our previous example: 'to let go', 'forget the past', and accept a profoundly unjust solution, because it is feasible and maintains peace. Much like the people in our previous example, the international community becomes frustrated with ongoing unresolved territorial disputes and is interested in a peaceful solution, not a just one. Justice has been replaced with peace and feasibility. An unjust solution, which would have never been considered moments after the invasion, is now pressured upon the invaded state. Time legitimizes; so far, in a descriptive sense.

Is it possible that time legitimizes in a normative sense? Suppose, as is reasonable to assume, that the standard of legitimacy of the UN is peace and ensuring that certain basic rights of states and individuals are not violated. Now suppose that extreme famine that cannot be dealt with creates a sudden extreme limitation of world's food sources, inadequate to feed the world population, even with the most efficient or fair allocation of wealth and food. Given the need of human nature to survive and that the UN is not just an international organisation but the world's forum, finding and allocating food is now the standard of legitimacy of the UN. It would be then legitimate to even allow wars of limited scale *if* that is the *only* way to focus resources on finding and allocating food, instead of prioritizing prevention of wars, leaving the world to starvation. The example may be unrealistic under the circumstances of the time of writing, but the point

is that time, with change of circumstances, has an effect on the normative standard of legitimacy because what is appropriate or proper sometimes depends, at least partly, on circumstances at each point in time. Therefore, what is the standard of normative legitimacy may at least partly depend on facts. This dimension is lost in Tier 2 where standards are set a priori on the objects of legitimacy. However, imaginative examples, like the aforementioned, help us realize that this dimension is always lurking in the background. It could be argued that this is an exception that could be built in from the beginning. So the normative standard of legitimacy of the UN is 'peace and ensuring that certain basic rights of states and individuals are not violated, but if there is famine…'. However, this would not save the problem because future circumstances are not restricted in an exhaustive list. It is reasonable for the normative conception of legitimacy of the UN to be peace. But at a time when genocides are still committed by states against their own citizens, without even war between states, then justice, in the sense of protection of basic human rights, becomes relevant as standard of normative legitimacy. A change of circumstances as in the food shortage example would bring finding and allocating food in the agenda. And so on and so forth.

3.4.3. Essential Contestability within the Conception: Democracy

Another category of cases where legitimacy is rendered an essentially contested concept is when the single conception of legitimacy in question is itself essentially contested. Although we will not conduct a detailed analysis of a specific conception (Tier 3), which will take place in the next chapter, we can give examples of conceptions which are themselves essentially contested. A great example is the conception of legitimacy in the realm of political legitimacy, i.e. the right and acceptance of the government and justification for coercion, because the predominant conception here is obviously democracy. In the way democracy is understood today, it is a rather vague idea, contrast to democracy literally speaking as invented by the Greeks, which was a very clear concept with a well defined meaning. I will now clarify and define democracy and illustrate that democracy is an essentially contested concept. If I am successful, then legitimacy of domestic legal orders is consequently also essentially contested. To begin, what is democracy?

Literally speaking, democracy ('demos', 'δήμος', people and 'kratos' κράτος, power) means people have, i.e. exercise, power, i.e. all powers. Hence, democracy in its literal sense means that legislative, executive and judicial powers are *not* exercised by elected representatives, but by the people themselves. Therefore, democracy did not exist *first* in 5th century BC Athens, but *only* in 5th century BC Athens. This is the only time in world history where citizens exercised all three functions, thus truly had power. The Athenian citizens voted for their own laws (Assembly of the People – 'Ekklesia tou Demou'), exercised executive power (600 magistrates each appointed for annual term) and adjudicated cases ('Heliaia' – 'Ηλιαία').

System of governance we now call democratic, with elected representatives, is exactly what democracy in its literal sense negates, and is in that sense anti-democratic. Democracy, people exercising power, is thus contrasted with systems of governance where others, contrast to the people, exercise power, whether that is a king, oligarchy or a larger number of representatives such as members of parliament, elected or not. Therefore, 'indirect democracy', as is confusingly called, that we have today, is not democracy in the literal sense of the term, since people do not exercise any of the three functions – legislative, executive or judicial, but it is representativism since elected representatives exercise powers. Even the idea of representativism is construed, because members of the parliament vote with their own consciousness, not whatever the people want them to vote. Thus, it is possible for the majority of voters to desire A, and for 'representatives' to vote for B. Power cannot be exercised indirectly. The idea of people exercising power is substituted by the idea of people not exercising power but voting every four years who will exercise power in their behalf. This would be so, even if people were electing a monarch every four years. The system of governance according to which people vote for their rulers,[140] is anti-democratic; it is the negation of democracy in its true sense; it is exactly what the 5th century Athenians were negating with their system of governance. The only democratic institution which has survived is the referendum, where people do legislate, to the usually limited extent referendums

[140] The fact that certain of their 'rulers' are not even elected, e.g. part of the legislative function in some states such as the House of Lords in the UK, renders the representative system even less democratic and thus further supports my point. The fact that judges are typically not elected by the voters but in many cases appointed only strengthens my argument: even if the appointment is made by elected rulers, the latter may select someone who would not be selected by the majority of the voters.

allow. Democracy in its literal sense has been substituted with the right to vote once every four years.

It could be argued that aside from referendum, what has survived from democracy in terms of systems of governance is not democracy itself but something quite different: the vague idea of participation of the people in the exercise of power by voting. This is thought to be the commonality between 'direct' and 'indirect' democracy, which renders them conceptions of the same concept. However, the problem with this argument is that by voting rulers every four years, voters do not 'participate' in the exercise of power. They do not adjudicate cases. They do not participate in the exercise of the legislative power because, as mentioned above, members of the parliament vote in their own consciousness and they cannot be revoked by the voters during their term. The expectation of re-election pressuring elected representatives to vote in accordance with the expectations of their voters is an explanatory reason why elected representatives sometimes vote the way they do; it is not an instantiation of people participating in the exercise of power. This would have been the case if the vote of the elected representatives was valid only if it was within certain contours or guidelines established by the people. However, this is not the case. In the executive function, again, rulers are not restricted by the voters, who have no say in the exercise of executive power. This is so regardless of how members of the executive function are appointed – by the legislative function (parliamentary systems), by a specific body such as the Electoral College (presidential systems like the US), or by popular vote (presidential systems like Cyprus). The power to rule ourselves has been substituted by the right to vote who rules us. Different systems of governance are more indirect as others. For example, in Cyprus citizens vote directly for the President, whereas in the US this is the competence of the Electoral College. Such a system allows for incidents where one presidential candidate (Hillary Clinton) wins the popular vote whereas another presidential candidate (Donald Trump) wins the vote of the Electoral College. Such anti-democratic results permitted by democracy as understood today makes one wonder how more indirectness can further ridicule the idea of democracy. Direct democracy and indirect democracy are not conceptions of the same concept, but clearly distinct, insufficiently similar, and mutually exclusive concepts.

The claim is a conceptual one, not a deontological or political one: I am claiming that two entirely different concepts should not be misconceived as two conceptions of the same concept; I am *not* claiming that modern societies *ought* to establish direct democracy, as that is obviously unfeasible.[141] Direct democracy, democracy in its literal sense, may be an ideal system of governance and has indeed existed effectively in a city with a population of 300 000 people in which only 30 000 people (Athenian adult males) were full citizens, but implementation of such a system in contemporary legal orders of much larger population[142] would render such a system of governance unable to function. Therefore, in contemporary reality, democracy in its literal sense is obviously not a reasonable/desirable system of governance to have.

It is equally unreasonable and perhaps manipulative, however, to rely on the common word 'democracy', in the terms 'direct democracy' and 'indirect democracy', in order to legitimize (in the sociological sense) the decisions of the established system of governance. If the current system of governance of the western world is legitimate must be assessed from within it, from its consequences etc., not from false comparisons drawing on the charm and desirability of the term 'democracy' which gives the impression of participation of the people. Just because a decision has been made in accordance with the current systems of governance, it does not mean that the decision is democratic in the literal sense, i.e. that the majority of the population supports it. The use of the word 'democracy' though, points to that direction which can be misleading, and to the extent that it attempts to legitimize (sociologically) such a decision, also manipulative.

Therefore, the word 'democracy' nowadays refers to a different concept. The word 'democracy' used to express the concept of people exercising power, whereas now it expresses the different concept of a representative system (the extent to which the rulers actually represent the people is of course a different matter). The same word used for different concepts may cause confusion (democracy – which one?), but the confusion is linguistic, not conceptual. The confusion lies on which concept is meant by the use of

[141] The reader ought to remember, at this point, that this discussion is philosophical, at least in the sense that it pertains to conceptual analysis, not political.
[142] One can also add to this: decisions made by states nowadays are far more complicated and sophisticated than in ancient times, making it harder for lay people to be able to exercise executive function, etc.

the word. But there is no confusion as to the meaning of any of the concepts. So far then, neither democracy in its literal sense, nor representativism are contested concepts, let alone essentially contested.

It could be argued, however, that the concept referred to as 'liberal democracy' or 'western liberal democracy' is an essentially contested concept. Liberal democracy is a system of governance which includes not only elected representatives as described above, but also transparency of governance and human rights. The latter, human rights, is what ascribes liberalism to 'liberal democracy,' as it establishes rights which typically protect the individual from the government and the representative majority. Democracy in its true sense is largely the majoritarian rule: the majority of the Athenian citizens decide what the law is, what the decision of the public court is, etc. Human rights, by contrast, limit the majoritarian rule, but also the representative majority, to the extent that they set limitations to what the majority (of people or of representatives) can do. Thus, if the majority democratically decide to torture a minority, this is impermissible because of human rights. The possibility of the majority tyrannizing the minority, the tyranny of the majority, was presented by John Stuart Mill at the very beginning of his famous book *On Liberty*. There is thus a contrast between the majoritarian rule (which elects representatives/rulers) on the one hand, and human rights on the other. This contrast may render liberal democracy as an essentially contested concept: one conception of liberal democracy may consist on policies which favour the majoritarian rule over human rights, whereas another conception may consist on policies which favour constitutionally protected (and thus not easily amended by the majority) human rights. In the absence of an argument solving the dispute between these two conceptions, the concept of a western liberal democracy is an essentially contested concept. Consequently, so is the concept of legitimacy of domestic legal orders, if the conception of legitimacy is liberal democracy.

The last part reflects a confusing contrast stipulated in the public debate as 'democracy vs republicanism.' Given the analysis above, the use of 'democracy' here is confusing and misleading, and best understood as representativism. Most modern states, like the United States, are democratic republics. The former indicates representativism, i.e. a representational system where citizens vote to elect politicians, and the latter indicates the existence of certain inalienable rights that cannot be taken away by the government

(even if it has been elected by a majority of voters), protected by a charter of rights or more typically by a constitution. Both components are part of democracy in the sense of western liberal democracy as the conception of political legitimacy used today and as part of system of governance of most modern states. However, these two elements oppose each other and they render democracy an essentially contested concept. One conception stresses representativism more, including more to what is determined by the legislature and the government and less to what is not, and on the other hand the other conception would move more towards republicanism restricting the legislature and the government, stressing and increasing the list of inalienable human rights. Both conceptions are most certainly supported by respectable arguments – for this, there is no doubt. How can the dispute between these two conceptions possibly be resolved? Different lines can be drawn depending on our moral intuitions, moral views, political views, our worldview and understanding of human nature, thus transferring the dispute to disagreement between worldviews, political ideologies, substantive moral disagreements and all such disputes which humans have disagreed with each other since the dawn of time. There is no argument which can solve the dispute between representativism and republicanism, so the dispute between these conceptions is inevitably endless.

Admittedly the argument suffers from oversimplification. For liberal democracy to be proven to be essentially contested, the complete conceptions must be presented. Each conception must fully specify 'how much' representativism vs 'how much' human rights component it includes in concrete terms. Here, I do not proceed to such an issue. I restrict myself to claiming that if such equally well argued conceptions are possible, in the absence of an independent argument solving the dispute between them, legitimacy of domestic legal orders would be an essentially contested concept. I will merely present an example, at least to show the usefulness of understanding this concept as essentially contested.

Suppose the following situation. In a western liberal democracy, the government is considering a referendum which, if answered positively, will harm to a certain extent some interests protected by human rights principles, but not to the extent that it would be unconstitutional given the established interpretation of human rights. Such an outcome would most certainly prevent future enhancement of the relevant human rights.

Suppose the government decides to go ahead with the referendum. Is this decision of the government legitimate? If the conception of liberal democracy assumed is the one emphasizing majoritarian rule, then the decision to proceed with the referendum is legitimate, because the majority of the people will decide. If the conception emphasizing human rights is assumed, the choice of the government is illegitimate because it risks harming human rights.

3.4.4. Dealing with Essential Contestability

We should not suffer from an 'essentially contested fetishism' and neglect the fact that other concepts are not like legitimacy which is content neutral and receives meaning from its conceptions; most concepts have much more content. It seems that nowadays, racism is treated as an essentially contested concept, which is false. On the one hand, one conception understands racism to mean regarding someone as an inferior human being in virtue of his/her race (any race). On the other hand, a different conception understands racism as any action which makes someone belonging to a race which has previously been oppressed feel uncomfortable. Under the second conception, one can be racist (in the sense of the first conception) against someone else, and that does not constitute racism because the race of the latter is not regarded as having been oppressed. Sarah Jeong, US citizen of South Korean origin, wrote tweets about liking to see white people suffer.[143] Explicitly stating that one enjoys seeing people suffering *because* of their race constitutes racism in the sense of the first conception, where it does not matter which race is being referred to. However, many regarded Sarah Jeong's comments as not racist because they assumed the second conception: white people have not been oppressed as a race (arguably true, as many white ethnic groups have been oppressed over the centuries), so the comments are not racist. According to the second conception, racism can only function towards certain races, not towards all. *After* those tweets, Sarah Jeong was hired by New York Times as an editor and later given a bigger platform. According to the second conception of racism, which is obviously infiltrating the public domain, one can regard members of a race which has not been oppressed (or believed to have not been oppressed) as inferior and express her pleasure in seeing them suffer without this constituting racism. This assumes that people of certain races are

[143] "oh man it's sick how much joy I get out of being cruel to old white men". Other tweets include 'Are white people genetically predisposed to burn faster in the sun, thus logically being only fit to live underground like groveling goblins.' and others which use language too offensive to be used in this thesis.

worthy of inferior treatment in virtue of their race, i.e. that different races are worthy of different treatment, which is exactly what the first conception of racism negates. Therefore, the second conception is a direct negation of the first. Like the two aforementioned conceptions of 'direct' and 'indirect' democracy, they are two distinct, insufficiently similar, and in fact very different concepts. If equality of races belongs in the sine qua non of the concept of racism, then only the first conception is valid and there is thus only one understanding of the concept. Conceptual clarity and intellectual honesty demand we use concepts with their true meaning and not manipulate concepts to advance opinions, political ideologies or personal temperament. Apart from the danger of 'essentially contested fetishism', what other impact can possibly occur with the understanding of legitimacy as an essentially contested concept?

Legitimacy being an essentially contested concept is an inconvenient truth. Consider current sensitive issues people feel strongly about, such as immigration policies. One view is open border policy, the opposite view advances closed borders, with the closest example being Japan, whereas most views lie somewhere between these two sides of the spectrum. For many such policies, a complex array of factors is considered, ranging from interests of immigrants, citizens, ability of the states to provide, security etc, and different weight is given in the balancing of these considerations. Different views/policies may reflect different conceptions of legitimacy of immigration policies. For example, the open border view maintains that immigration helps reduce poverty and that treating human beings differently because they were born on the other side of a national boundary is unethical. This may also be part of the normative conception of legitimacy of immigration policy according to this view. If so, according to this view, other immigration policies which reduce or block immigration are illegitimate because they do not contribute – or do not contribute enough- to reducing poverty and they treat human beings unethically. By contrast, in the other extreme, the closed borders view holds that a society has the collective moral right to protect its way of life and culture, its distribution of wealth, standards of living, and that we have different moral obligations to our fellow citizens than to foreigners. This view may be a part of a normative conception of legitimacy of immigration according to which immigration policies which allow non citizens without restrictions or qualifications to settle in a country treat citizens unethically as they harm their interests and unjustly benefit foreigners over citizens. In the absence of an independent argument to solve the dispute

between well argued competing conceptions of legitimacy, the nature of legitimacy as an essentially contested concept appears. Sociologically speaking, given how sensitive the topic of immigration policy is at present, it is hard for supporters of each view to accept that their position is illegitimate from the standpoint of the other views.

Legitimacy being an essentially contested concept may well be a more inconvenient truth to accept than the difficulty of tolerance in democracy. In the case of difficulty of tolerance in a democracy, one only needs to accept that other citizens have the right to their opinion and pursuit of happiness and lifestyle, etc., although they are radically different. By contrast, here we are asked to accept, at least where legitimacy will include substantive and especially moral criteria, that our values do not pose in the discussion the necessary truth claim we assume they do. With the difficulty of tolerance in democracy, I only have to accept that you have the right to make a public protest about something I may disagree about. I do not have to accept that your opinion is reasonable. I am perfectly consistent maintaining that I am right and you are wrong, my claim is true and yours is false and also unreasonable, and I merely tolerate the exercise of your right. By contrast, with legitimacy being an essentially contested concept, I have to accept that your conception is as reasonable as mine.[144] I have to accept the harder truth that it is the nature of the question which invites these kinds of disagreements and my stance does not pose an absolute truth claim.

Let's take religious fundamentalist movements as a final example. A few centuries ago, certain European powers forced natives in their colonies to convert to Christianity. More recently, Taleban enforces a literal interpretation of the Sharia law and the Quran with the well-known brutalities. If one seriously believes that he has the moral obligation to convert people to Christianity as that is the only way to rescue their souls from eternal damnation, then not acting so is immoral. If one takes the commands of the Sharia law and the Quran (including 'kill the infidels', etc.) literally and believes they are moral obligations and as such ought to be fulfilled to the utmost, not acting as per Taleban is immoral. The religious beliefs of the Christian colonizers on the one hand and the Taleban on the other pose an absolute truth claim. The truth value of their

[144] This does not mean of course that any conception of legitimacy advanced is reasonable. What is perceived to be legitimate is sociologically legitimate. Here I am referring exclusively to normative legitimacy. The conceptions considered are the ones that, normatively speaking, are equally well argued.

beliefs necessarily entails that everyone else is wrong (God and Allah both claim exclusivity), all other metaphysical beliefs and secularization alike; it is impossible to accept the grounds of the other views. The truth claim of such views is incompatible with pluralism. Fundamentalist Christian colonizers and Taleban reject any other ground for any other metaphysical belief or atheism and they both agree to disagree. It is only third parties (atheists, secular governments, etc.) who have the luxury to discuss the right of freedom of religion and acknowledge the right of all to hold any metaphysical beliefs without commenting on the truth value of those beliefs. Both the Christian colonizers and the Taleban disrespect anyone else's right of freedom of religion, and they feel their disrespect is entirely legitimate, because they both believe that only they hold legitimate beliefs, so everyone else has no moral right to hold contrary or even incompatible beliefs. The Christian colonizers and the Taleban agree to one claim: one of them is right, everyone else is wrong, and everyone else has to submit to the one truth.

The last bit is taken away with criminal law and human rights. It is easy to disregard these religious fundamentalist views from the public debate on the grounds of them being illegitimate because they violate fundamental human rights. However, if we take away certain illegal and illegitimate aspects of these views – murders, forced conversions, etc. – the remaining part overlaps with legitimate religions of Christianity, Islam, Judaism etc.: all religious views assume that the others are wrong. The difficulty of tolerance in democracy is accepting pluralism, respecting the rights of others to have and express their views even if they are inconvenient for the rest, regardless of the truth value of their beliefs. Free market of ideas in a democracy gives the hope that with the public debate and exchange of ideas, there may be a convergence of views, as there may have been, for example, in the case of pornography which was once the exception, but having been justified in the public debate as giving alternative views in sex life, it has now become ordinary and widely accepted. The nature of religious views differs from the nature of views regarding sexuality, in so far as the latter refers to what can be studied with unbiased objectivity and science (positive sciences, psychology, etc). Certain truths regarding sexuality are verifiable with scientific method and social experience. This is not the case with religious views which are grounded on belief. Free market of ideas cannot lead to normative truths about religion. Legitimacy as an essentially contested concept moves one step further and completes the picture: the

nature of the disagreement is such that the legitimacy of views, e.g. religious views, is essentially contested. It casts doubts on the hope or possibility of convergence of views.

Of course, like Applbaum also maintains, the barriers are not fixed. What is an essentially contested concept may change. Consider the word 'democracy'. In antiquity, it meant that people exercise power, as the etymology clearly states, whereas now it means the opposite, i.e. representativism, a system of governance where people do not exercise power. It is possible that with the lengthening of the list of human rights, the gradually broader interpretation of human rights by the courts and in general the increasing emphasis on human rights and which we feel must not be reduced by future governments or legislatures, the word 'democracy' may come to mean a system of governance more republican than the current western liberal democracies.

A concept being essentially contested is dependent on the contestability of a notion/claim with the semantic connection between words and meanings at any given point in time. It is thus possible that although at present legitimacy is an essentially contested concept, in the future it may become detached from a vague sense of properness (Tier 1) and come to have a much narrower scope manifested only in given contests with established meaning. It may become, for example, entirely identified with political legitimacy alone, i.e. justification of governmental authority, and especially with a specific standard, e.g. democratic legitimacy in the sense of western liberal democracy more towards republicanism. Language is a creation of human intellect and such possibilities are limitless. It is thus important to stress that the claim that legitimacy is an essentially contested concept is conditioned by the current conceptual framework and use of terminology – the semantic connection between terms and meanings. Language and concepts are by nature amenable to change.

Although the barriers may change and legitimacy as a concept may change so as to become a different concept and thus perhaps a non-essentially contested concept, legitimacy as meant at present (properness) is an essentially contested concept by its nature. The conclusive argument why legitimacy is an essentially contested concept consists both on what legitimacy as a concept *is*, i.e. standard of properness, and respectively what it *is not*, i.e. it is content-free. Indeed, as discussed in the previous chapter, the content of the concept of legitimacy is minimal. Detached from individual

conceptions, the only content in this concept (apart from the vague standard of properness) is that it is a moral power, which merely tells us what kind of right it is within the Hohfeldian scheme. The rest of the content depends on the context, which often depends on the specific circumstances, so legitimacy may be situational. In such cases, since we cannot anticipate the context, we do not know the content, which is what gives rise to different conceptions. There are bound to be cases where, due to circumstances/facts/context, different competing conceptions will be equally well argued without an independent argument possible to solve the dispute between them.

For sure, legitimacy being an essentially contested concept does not mean that it is so in every instance that it is invoked, but the fact that in certain instances it will be, that reveals the nature of the concept detached from its conceptions. There are indeed instances where only once conception grounds legitimacy (or illegitimacy) of an object. For example, in self-defence,[145] the nature of the concept of legitimacy as an essentially contested concept is not revealed, since there are no competing conceptions of self-defence, let alone lack of argument solving the dispute between them. The fact that in certain cases, due to the nature of the object of legitimacy in question, the conceptions/content of legitimacy depend on context (facts/circumstances) which is not predetermined means that in some cases there are bound to be equally reasonable competing conceptions without an argument which can solve the dispute between them, revealing the nature of legitimacy as an essentially contested concept.

3.5. Conclusion

In this chapter, I discussed the conceptual relationships pertaining to the concept of legitimacy. In particular, I discussed the so-called 'legal legitimacy', the relationship of the concept of legitimacy with authority, entertained the distinction between the concept and several possible conceptions and concluded that legitimacy is an essentially contested concept.

[145] It could be the case that self-defence itself has competing conceptions, one consisting exclusively on defending an actual attack excluding anticipatory self-defence, another conception including anticipatory self-defence. Not only it is established both in domestic legal orders but also in the international legal order that anticipatory self-defence is included in the concept of self-defence (it is a kind of self-defence, not a different concept), more importantly, this is an entirely different point from the issue at hand, which is that defending oneself against an attack is legitimate for the obvious prudential reasons.

First, I claimed that there is no concept of 'legal legitimacy'. Assuming legal positivism, not as a robust theory of law but merely as a proposition of validity of legal norms, 'legal legitimacy' collapses to legal validity. 'Legal legitimacy' signifies a legal obligation to submit to an object of legitimacy (action, rule, actor or system). However, only legally valid norms create *legal* obligations. Therefore, 'legal legitimacy' collapses to legal validity. Natural law cannot make a case for the so called 'legal legitimacy either. On the one hand, if natural law is understood, as per Finnis, as assuming legal positivism ('bad law is not law' means that bad law is not morally obligatory), 'legal legitimacy' collapses again to legal validity, as when assuming legal positivism as explained above. On the other hand, if natural law is understood, as legal positivists understand it, as negation of legal positivism ('bad law is not law' means that moral justifiability is an essential condition of legal validity), then 'legal legitimacy' collapses to legitimacy, or at least certain normative conceptions of legitimacy.

Second, I discussed the concept of authority and its connection with legitimacy. With Raz's 'service theory' of authority, authority is understood as granting second order reasons for action which exclude first order/deliberative reasons from consideration, so that by complying with authority the addressee conforms better with reason. Effective (de facto) authority consists in power, with the claim to legitimate authority. In the concept of legitimate authority, the two concepts are indeed intertwined, as authority contributes the issue of power, whereas legitimacy brings in the right, necessary for legitimate authority to be distinguished from effective (de facto) authority. In a purely legal sense, the term 'authority' may refer to a different concept, that of legal competence, as in 'The police officers have the authority to arrest suspects.' Obviously, this concept is more closely related to legal validity, rather than legitimacy.

Third, I discussed the relationship between the concept of legitimacy and its individual conceptions, with reference to Gallie, Hart, Rawls, and Dworkin. A contested concept is simply a concept regarding which there are different conceptions. Essentially contested concept, as per Gallie, is the concept regarding which there is more than one equally reasonable and well argued conception, and there is no argument that can solve the dispute between competing conceptions. Hart does not discuss essentially contested concepts but draws on the concept vs conception distinction. He understands justice as 'Treat cases alike and different cases differently' and understands that the criterion used

in determining when cases are alike or different is a shifting or varying criterion. These shifting or varying criteria form conceptions of the concept. Rawls also makes the concept vs conception distinction. He claims that the concept of justice is contested, i.e. there are various conceptions of justice, and that his progressive conception is the correct one. In his theory of interpretation, Dworkin also makes the concept vs conception distinction and believes that the dispute between different conceptions of a concept (such as 'cruel' punishment) can be resolved, so the concept is not 'essentially contested'.

Finally, I claimed that legitimacy is an essentially contested concept. There can be various conceptions of legitimacy, some of which are equally reasoned and well argued; in the absence of an argument that can resolve the dispute between them, the concept of legitimacy remains essentially contested. What the normative standard of legitimacy is depends on the object of legitimacy and the context, the circumstances. As illustrated in the previous chapters, the only permanent content of the concept of legitimacy, i.e. the only content of legitimacy which is always present regardless of the specific normative conceptions of legitimacy, is that it is a vague standard of properness (which is specified by conceptions) and it is a moral power. Consequently, the concept of legitimacy is open ended, content-neutral and lends itself to equally well argued standards/conceptions, without an argument to solve the dispute between competing conceptions.

Having discussed the distinction between concept and conceptions and clarified that legitimacy is an essentially contested concept, it is now time to turn to normative conceptions of legitimacy, in international law in particular. This choice already begs two questions. First, since the claim the discussion advances is that legitimacy, detached from its individual conceptions, is an essentially contested concept, why bother with individual normative conceptions? Second, why choose legitimacy of international law in particular? I shall begin the next chapter by answering these two questions.

CHAPTER 4
Tier 3 – Justice, Legitimacy and Essential Contestability

4.1. Introduction

Discussing certain normative conceptions illustrates the concept as essentially contested. Towards the end of the previous chapter, we noticed that one of the instances in which legitimacy is an essentially contested concept is where the standard of legitimacy itself is essentially contested. In this chapter, I have chosen to discuss a theory which will help illustrate this exact point. The theory is Buchanan's theory of justice, in the sense of protecting human rights, as a standard of legitimacy of international law. Since justice is itself an essentially contested concept, so is legitimacy.

It so happens that there may be a double contestability here. On the one hand, legitimacy of international law may be an essentially contested concept. Justice, in the sense of protection of basic human rights, is one conception, whereas a different conception is peace and stability, as per the UN Charter. Another conception, as we shall briefly see in the end, is Steven Ratner's two-pillar standard which includes both peace and human rights. If there is no independent argument solving the dispute between these conceptions, then legitimacy of international law is an essentially contested concept. 'Legitimacy of international law' means that the concept of legitimacy is latched on the object of 'international law' – it thus belongs in Tier 2. On the other hand, analysis of the normative conceptions of legitimacy belong to Tier 3. Such conceptions themselves can be essentially contested. Although it is hard to see 'peace' as an essentially contested concept, the analysis in this chapter will show that the opposite could be the case for justice. Justice may consist of protection of human rights, or, in a higher level of abstraction, giving one what is worth as presented by Aristotle.

Since moving from Tier 2 to Tier 3 means moving from the concept of legitimacy to normative conceptions of the concept, one could move to any conception of that

concept; why then move to conceptions of legitimacy of *international* law in particular? As mentioned in the introduction, there are quite a few reasons for this choice. First, since Plato, legitimacy in domestic legal orders has been heavily discussed. In political legitimacy, i.e. the right and acceptance of the government and justification for coercion, it has become clear that several standards, i.e. conceptions of political legitimacy, are available: for Plato, the standard of legitimacy is that philosophers rule,[146] for Aristotle three standards of legitimate government are royalty, aristocracy and constitutional government,[147] for Egyptian pharaohs, certain French kings and contemporary North Korean dictators, the right to rule derives from the divine,[148] whereas a few centuries ago, for Hobbes, Locke and Rousseau it is social contract with which we consent to form and abide by a government because of the prudential reason of avoiding the state of nature.[149] Second, it has now become common ground that none of these standards hold to scrutiny. Even though certain writers voice human rights per se as the dominant conception of political legitimacy,[150] this is so only in the broader context of democracy, which actually nowadays has come to include human rights. Indeed, the most prevalent standard of political legitimacy is democracy, which includes, apart from participation of people through elections, human rights, transparency and system of checks and balances. As regards legitimacy of domestic legal orders, democracy tends to dominate. This tendency is so widespread that

[146] See generally Plato, *The Republic and Other Works* (Benjamin Jowett translation, Anchor 1980).
[147] Aristotle, *Politics* (Benjamin Jowett translation, Clarendon 1985) Book III, Chapter VII.
[148] For examples of claims to divine ordination from Japan to England, see Reinhard Bendix*, Kings or People: Power and the Mandate to Rule* (University of California Press 1978).
[149] Thomas Hobbes, *Leviathan* (first published 1651); Jean-Jacques Rousseau, *Du contrat social* (first published 1762); John Locke, *The Second Treatise of Government* (first published 1689). Hobbes and Rousseau, true adherents to the contractarian vision and representatives of the 'pure' or 'primary' social contract theory, hold that mutual consent of individuals is the ultimate justification of all legitimate social and political institutions (ultimate source of political legitimacy), while Locke and Kant emerge as advocates of derivative social contract theory, maintaining that the primary justification for such civil institutions is found in something that is both logically antecedent to the social contract and independent from it – for Locke it is labour, which justifies individual's absolute and fundamental natural right to property, the protection of which is the only true function of the government, function for which unilateral consent is required) and for Kant inherent individual rights and duties. Michel Rosenfeld, 'Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory' (1985) 70 Iowa Law Review 769, 847-863.
[150] Jack Donnelly, 'Ethics and International Human Rights' in Jean-Marc Coicaud & Daniel Warner (eds), *Ethics and International Affairs, Extent and Limits* (United Nations University Press 2001), 137: 'Human rights have become the dominant conception of political legitimacy' and Charles Jones, *Global Justice: Defending Cosmopolitanism* (OUP 1999), 50: 'rights approach' is the 'most popular form of cosmopolitanism in both academic and non-academic discourse'. Both in Martti Koskenniemi, 'Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism,' 7 Associations: Journal for Legal and Social Theory (2003) 349, 364.

legitimacy is often used as shorthand for 'democratic legitimacy.'[151] In 2011, when former US President Barack Obama stated that 'Qaddafi has lost the legitimacy to rule and needs to leave', he was referring both to Libyans no longer supporting Qaddafi, i.e. democratic legitimacy. It was later revealed that this allegation was one of the three myths used to eliminate Qaddafi,[152] but the point here is not whether Qaddafi had *indeed* lost legitimacy,[153] but the fact nowadays, it goes without saying that political legitimacy in the context of domestic legal orders is conceptualized as democracy. Similarly, it is the same conception of legitimacy, i.e. democratic legitimacy, that he assumed in his speech to the UN General Assembly regarding attack on Iraq, former US President George W. Bush, when stating that the regime in question had 'lost its legitimacy.'[154]

---

[151] Manfred Elsig, 'The World Trade' Organization's Legitimacy Crisis: What Does the Beast look Like?' (2007) 41 Journal of World Trade 75.

[152] The three myths were that Libyan people were no longer supporting Qaddafi, that Qaddafi was authorizing mass rapes and stories of hordes of African mercenaries. The myths were revealed as such five years after the war, in London in September 2016, by an explosive report from Christian Blunt (Member of the Parliament), who launched an investigation on the war in Libya. However, people working on the ground knew that these were myths even when they were happening. For example, "Donatella Rovera, senior crisis response adviser for Amnesty, who was in Libya for three months after the start of the uprising, says that 'we have not found any evidence or a single victim of rape or a doctor who knew about somebody being raped'." in Patrick Cockburn, 'Amnesty questions claim that Gaddafi ordered rape as weapon of war', *The Independent* (24 June 2011) https://www.independent.co.uk/news/world/africa/amnesty-questions-claim-that-gaddafi-ordered-rape-as-weapon-of-war-2302037.html. Donatella and other officials such as Vincenzzo Camporini,, Italian Chief of the Defense General Staff (2008-2011) who revealed that the 'photo of mass grave' shown by Franco Fattini, Italian Foreign Minister, to Bellusconi, was in reality photo of an ordinary cemetery taken at a time when they were digging graves of people who had died natural deaths, have revealed the truth in the documentary 'Killing Gaddafi'.

[153] It could be argued that I am conflating normative with sociological legitimacy, because whether Barack Obama, David Cameron, and Nicolas Sarkozy believed that Qaddafi is illegitimate pertains to sociological legitimacy, not normative. It is true that the legitimacy-related beliefs of people, both the aforementioned politicians and others, such as Secretary of State of the US Hillary Clinton, and also non-politicians such as masses of the public, constitute sociological or perceived legitimacy, not normative legitimacy. However, I am specifically referring to the standards/conceptions of legitimacy which are relevant, which in this case are democracy and human rights, not whether these standards actually do render this object of legitimacy, i.e. Qaddafi's regime, legitimate or not. Since the allegations against the Qaddafi regime have been proven to be false, the regime was sociologically illegitimate but normatively legitimate (unless it is proven to be normatively illegitimate based on different conception of legitimacy). Interestingly, if it is proven that the politicians who advanced the aforementioned allegations/grounds of illegitimacy against the Qaddafi regime knew that they were not true, based on technologically advanced and shared secret intelligence of their states, it makes one wonder whether the Qaddafi regime is even sociologically illegitimate, since the people in question do not really perceive the object of legitimacy to be illegitimate but merely pretend they do. This question however pertains exclusively to the nature of sociological legitimacy and its role in the public debate and though interesting, it far exceeds the scope of this discussion.

[154] 'The security council resolutions will be enforced, the just demands of peace and security will be met or action will be unavoidable and a regime that has lost its legitimacy will also lose its power.' For the text of the entire speech see, e.g. https://www.theguardian.com/world/2002/sep/12/iraq.usa3. As regards the response to this statement being an instance of sociological instead of normative legitimacy, see the previous note.

In the international legal realm, however, it is more recently that legitimacy is being discussed, especially after the aforementioned Kosovo report, which identified an intervention at Kosovo as 'illegal but legitimate' in order to prevent a humanitarian catastrophe. Plato and Aristotle discussed legitimacy in domestic legal orders, but not in international law. Later understandings of international law derived from natural law. Nowadays, unless provided by specific context, the conception of legitimacy in international law remains rather unclear. Although there are voices about democracy in international law[155], it is believed that this is too high of a standard and even utopian.[156] Despite the UN Charter referring to peace and security, it is often clear that the conception of legitimacy pertains to humanitarian concerns, prevention of genocide and torture, and protection of basic human rights.

It is for this reason that Buchanan's theory of human rights as a conception of legitimacy in international law will be discussed. Even though Buchanan himself may have departed from this view with his more recent Metacoordination view, human rights as a conception of legitimacy remains prevalent so it deserves the attention it will receive. Since the US/UK attack on Kosovo, there is a growing tendency toward justifying interventions in order to protect human rights. A manifestation of this growing tendency is the Responsibility to Protect, which, though not a legally binding norm, at least not yet, is a global political commitment which was endorsed by all member states of the United Nations at the 2005 World Summit. Although the Responsibility to Protect currently restricts itself to measures that already exist, i.e. mediation, early warning mechanisms, economic sanctions, and powers of Chapter VII of the UN Charter, and does not provide for a right to use military force against a state without a UNSC authorization, the reaction towards such uses of military force seems to be weakening, with the belief that protection of basic human rights being increasingly important lurking at the background. Buchanan's theory is the most complete theory of human rights as a standard of legitimacy of international law and it well deserves the attention it receives.

[155] See, e.g. Roland Rich, 'Bringing Democracy into International Law' [2001] 12 Journal of Democracy 20.
[156] Allen Buchanan, 'The Legitimacy of International Law,' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), 93.

Human rights aside, why not choose more prominent discussions of legitimacy of international law such as Mattias Kumm's and Thomas Franck's? Besides, Buchanan himself, as we shall see, has changed his view regarding legitimacy in international law, from justice in the sense of protecting human rights, to the Metacoordination view which will be briefly mentioned later. Another prominent view of legitimacy of international law is Mattias Kumm's view as presented in the *Legitimacy of International Law: A Constitutional Framework of Analysis*.[157] In this article, Kumm develops 'a constitutionalist model for assessing the legitimacy of international law that takes seriously the commitments underlying constitutional democracy.'[158] He grounds his model on four principles: the formal principle of international legality, the jurisdictional principle of subsidiarity the procedural principle of adequate participation and accountability and the substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable. In this particular conception of legitimacy, the principle of international legality establishes a presumption in favour of the authority of international law. This presumption can be rebutted by international legal norms that seriously violate countervailing normative principles relating to jurisdiction, procedure or outcomes. Finally, another great work in legitimacy of international law is Thomas Franck's *The Power of Legitimacy Among Nations*,[159] which, is, however, about sociological/descriptive legitimacy, not normative legitimacy. Indeed, in this great study, Franck employs a broad range of historical, legal, sociological, anthropological, political and philosophical modes of analysis to explain what makes states and people *perceive* rules as legitimate. These discussions are indeed more prominent discussions of legitimacy of international law.

Why then has Applbaum's theory of international law as justice in the sense of protecting human rights been chosen here? Simply because the purpose of this chapter is not to determine which discussion presents the most prominent or valid theory of international law, nor to present the most prominent discussions of legitimacy of international law, but merely and specifically to exemplify/illustrate that legitimacy is an essentially contested concept. The theory chosen is an excellent example of essential contestability of legitimacy, exactly because of the concept of justice and human rights.

[157] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 5 European Journal of International Law 907.
[158] Ibid, 907.
[159] Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990).

4.2. Human Rights as a Standard of Legitimacy

In *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, Allen Buchanan advances basic human rights as the normative conception of legitimacy of international law; in other words, he advances basic human rights as the normative standard of legitimacy. In his later book *Heart of Human Rights*, he takes a rather different approach focusing on justifying the current international human rights system and its practice. That will be very briefly mentioned in the end for reasons of completion but will not be discussed as it does not help us see legitimacy of international law as an essentially contested concept. I am focusing on the theory as illustrated in *Justice, Legitimacy and Self-Determination* because his theory is specifically a normative conception of *legitimacy* and the standard of justice is an essentially contested concept, thus also rendering legitimacy as such. I will now place this theory in the conceptual framework of legitimacy as illustrated in this discussion thus making a few important clarifications.

4.2.1. Theory of Legitimacy of 'International Law'

The object of legitimacy is quite less obvious than what it seems. The object of legitimacy is the answer to the question 'What is legitimate?' Buchanan refers to 'international law' as the object of legitimacy. 'International law' may mean quite a few different things. It may, for example, refer to the international legal order as a system of legal norms per se, regardless of the political institutions that create, interpret and apply them. This is how Kelsen discusses international law in *Principles of International Law*. On the other hand, 'international law' could mean the system of legal norms together with the political institutions that create, interpret and apply those norms. So, for example, a violation of international law that goes unpunished due to the lack of central enforcement mechanisms in the international legal realm is a problem of the international legal system in the second sense, because the problem consists on application of international law. Enforcement alone is not an issue for international law in the sense of legal norms alone (unless of course these norms become inapplicable to such an extent that the legal order as such is not effective). Also, anything that pertains to the regime of international law at a specific point in time relates to international law as system in the latter sense (with institutions of interpretation and application etc) and

not to international law in the former sense, a legal order consisting of a system of legal norms, regardless of institutions of interpretation and application etc. For example, the UN system per se pertains to international law in the second sense, not the former. Thus, international law at the times of the League of Nations was international law in the former sense, but different international law in the latter sense. In antiquity, there was international law in the former sense, as there were rules regulating the relationships between states, such as peace treaties or unwritten customary rule that the winner of a war has the right to take the population of the loser as slaves, but it may as well not count as international law in the latter sense as there were no international organisations whatsoever. There were no legal entities to create, interpret, let alone apply international legal norms.

Buchanan, however, by 'international law', does not refer to any of these two intuitive meanings, but to something different, yet relevant to the latter. He clarifies from the beginning that even though in the book he occasionally refers to 'the international legal order' or 'the 'international legal system', he is particularly referring to the global law-making institutions themselves, not to international law as a legal order.[160] The object of legitimacy is thus not individual laws, nor a legal order, nor actions, but actors.

4.2.2. What Does the Theory Do?

So, what is it that Buchanan's theory actually does? It is clear that Buchanan's theory is a normative conception of legitimacy of international global law-making institutions, and that Buchanan intends it to have practical consequences. He evaluates "some of the most important principles of the existing international legal order" and proposes "new principles or modifications of existing ones that are more consonant with the demands

[160] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2003), 2: 'From time to time in this book I refer to 'the international legal order' or 'the international legal system.' Sometimes I refer to the whole international legal system as an institution, meaning that it is a super-institution including many institutions within it. So let me clarify here at the outset what I mean: An institution is a kind of organization, usually persisting over some considerable period of time, that contains roles, functions, procedures, and processes, as well as structures of authority.' I am personally reluctant to see international law as an institution (whether or not it includes other institutions within it), much like I cannot see a domestic legal order as an institution, but as a legal order or system. If one chooses to see the UN as the respective of the state in international law, a rather bold comparison, the distinction between two different objects and object types, the legal system (domestic legal system/international legal system) and an actor (state/UN), remains clear. However, not much depends on these terminological choices. What is important is that Buchanan's theory is a theory of legitimacy of global law-making institutions.

of justice."[161] In some cases he makes concrete suggestions for institutional reform, "not just in the sense of incorporating new principles into old processes and structures, but also in the sense of changing some of the processes and structures themselves."[162] His enterprise, then, is to articulate a set of moral principles that should guide the design and reform of international law as an institution in the broad sense that includes not only principles but also roles, processes, and structures.[163] It is clear then that on the basis of certain moral principles, Buchanan evaluates certain fundamental aspects of the international legal order and proposes reforms which, if implemented with reasonable care, would make the system more just; his concern then, is with what the law should be.[164]

It is quite important to understand that '*de lege ferenda'*, i.e. what the law should be, is the end goal of Buchanan's theory. One could assume that morally evaluating the law merely tells us whether the law is good or bad, without giving any suggestions. This is entirely reasonable given that there may be a distinction between morally evaluating the law on the one hand, and on the other hand deciding what the law ought to be, or what the goal of a legal order is or should be. It could be assumed that morally evaluating the law would merely consist on setting out certain moral principles, certain a priori moral criteria, and deciding whether the law based on certain moral criteria is morally acceptable or not. On the other hand, how the law ought to be could be understood as a policy question, which can be morally evaluated, but not determined by specific moral criteria or moral principles. It is important to note that Buchanan attempts to do both.

So, what are these reforms that Buchanan's theory brings about and how does he get there? His reforms lie largely in the area of self-determination. He argues that "a principled, human rights-based approach to the problem of secession would reduce the need for armed humanitarian intervention by providing constructive alternatives to secession and the massive violations of human rights that almost always accompany it."[165] The theory starts with the claim that there is a limited moral obligation "to help ensure that all persons have access to institutions that protect basic human rights."[166]

[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] Ibid, 4.
[165] Ibid.
[166] Ibid, 5.

Buchanan then constructs "an account of legitimacy according to which political entities are legitimate only if they achieve a reasonable approximation of minimal standards of justice, again understood as the protection of basic human rights. This account of legitimacy is then adapted so as to encompass both the legitimacy of individual states within the international legal system and the legitimacy of the international legal system itself."[167] In the third part, Buchanan uses this justice-based conception of a legitimate state to construct a position on how the international legal order should respond to the problems of self-determination and secession. In particular, he argues that international law should recognize a unilateral right to secede - as distinct from a negotiated or constitutional right – only as a remedy of last resort against grave injustices.

4.2.3. The Theory

4.2.3.1. Justice as human rights and justice as an essentially contested concept

The normative standard is justice, in the sense of protecting basic human rights. It is extremely important to notice the tricky term 'justice' and also focus on what exactly is meant by it, i.e. protecting basic human rights. This is because 'justice' and 'human rights' have not always necessarily fully overlapped. Since Plato and Aristotle, a traditional meaning of the term 'justice' is more generally giving each person what he/she deserves; giving each person his or her due. Protecting basic human rights is a specification of this general traditional meaning.

Even 'basic human rights' requires further specification. Does that include only individual, so-called 'negative' human rights alone, or does it also include rights of distributive justice (social and economic rights), so called 'positive' rights?[168] In the international legal realm, individual rights, so called negative rights, are found in the International Covenant on Civil and Political Rights (ICCPR), such as the right to life, the right to not be required to perform forced or compulsory labour, etc. Rights of distributive justice, also called social rights or positive rights, are found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Examples include the right to social security, right to housing, food, etc. Individual rights are often

[167] Ibid.

[168] The use of term 'individual' rights invites for the 'individual vs collective' distinction, thus for the use of 'collective' rights as regards the so called 'positive rights'. However, many such rights, such as the right to social security (Article 9 of the ICESCR) are individual, not collective rights, because they are not exercised by a group, but by an individual.

called negative rights because they consist on negative obligations. Being (claim) rights and not liberties, they consist on correlative duties. With classical liberalism at the background, i.e. the idea that there is a sphere around the individual that ought to be protected from interference by either the state or other individuals, the implied obligations of the individual rights are understood to be negative duties, i.e. obligation to refrain from certain actions. In other words, these rights were understood merely as rights of non-interference. Thus, the right to life consists on the negative obligation towards everyone to not take my life away arbitrarily. My right to not be tortured (Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment) consists on the obligation towards everyone, state and other individuals alike, to not torture me. By contrast, economic, social and cultural rights are positive rights, i.e. they entail positive obligations toward the state, which has to intervene in order to satisfy the interests they protect. For example, the right to social security does not consist on non-interference, i.e. the government is not hereby obligated to refrain from any action, but on the contrary to interfere in the economy, increase taxes etc, in order to provide social security. This understanding draws a clear-cut distinction between individual rights entailing negative obligations and positive rights entailing positive obligations, which justifies the use of 'negative' and 'positive' rights respectively. However, through interpretation, individual rights are understood as entailing not only negative, but also positive obligations, even though that is not obvious from the letter of the law. For example, the right to life is understood not only as implying the negative obligation to not take one's life away, but also the positive obligation of the state to intervene by establishing an effective criminal and justice system which protects the life of individuals. The right to not be tortured does not only consist, as the letter of the law reads, on the obligation toward everyone else to not torture, but also on the state to have measures in place, such as an effective criminal and justice system, which protects individuals from torture. I may occasionally use the terms 'negative' and 'positive' rights for convenience, but it must be noted that the negative rights are interpreted as entailing positive obligations as well.

Does the fact that 'negative' rights are understood to entail not only negative but also positive obligations equate them with 'positive' rights? Although the ICESCR and the ICCSPR have the same standing in international law and the rights are indeed of equal significance, there are two important differences between these two kinds of rights in

question. First, unlike the individual rights, the economic, social and cultural rights are dependent on the resources of the state (ICESCR Article 2, par. 1[169]). Therefore, based on the ICESCR, a state does not violate such rights if it does not provide because of lack of resources. In all actuality, the question transforms to how much is provided, it is a question of degree. The point however is that the same is not the case with individual rights, in the sense that as a matter of logic and Hohfeldian analysis of rights, the bearer of the obligation toward the claim right in question cannot invoke lack of resources as justification for not satisfying the correlative negative obligation, whereas that is possible with the positive obligations. The state can claim that it does not have enough resources to provide social security ('positive' right of distributive justice of the ICESCR) or to invest more in improving the criminal and justice system to better protect the life of individuals (positive obligation entailed by the individual 'negative' right to life – ICCPR). However, the state cannot claim that it is unable to *refrain* from killing or torturing people because of lack of resources. Negative obligations, unlike positive obligations, because of their nature as mere non-interference, do not depend on availability of resources. This means that although individual, so-called 'negative' rights, entail positive obligations as well, they are not the same as the rights of distributive justice, also called 'positive' rights, because the 'negative' rights can be understood, if read literally with the Hohfeldian scheme in mind, to consist on only negative obligations. The theory observes the first part, i.e. that both kinds of rights relate to positive obligations, but misses the second part.[170] My claim here is not that 'negative' rights should be interpreted/understood as consisting only on negative obligations. My point is that individual and social rights are not of the same kind. Understanding 'negative' rights as entailing positive obligations as well is an interpretative or political choice, not an obligation necessarily entailed by the stipulation of the right as a matter of Hohfeldian analysis. From 'right to life', only obligation to not take life away can be inferred as a matter of logic. All other obligations, which are positive obligations (such as to establish criminal and justice system), are interpretative/political choices (in a broad sense of 'political'). The reason why it is

[169] 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'
[170] Buchanan, (n 160), 196.

unknown what other positive obligations can be inferred as correlative in the future,[171] is exactly because these positive obligations are inferred by interpretative/political choices. These interpretative/political choices are correct because they better protect the interests[172] that the rights in question aim at protecting. Indeed, it would be futile to prohibit anyone from taking my life away, if anyone can do so without consequences, because no one has the obligation to establish mechanisms that prevent someone from taking lives away. The point here is that the choice of interpreting 'negative' rights as also entailing positive obligations is exactly this: a choice. There is a logical primacy[173] of refraining from causing harm, compared to actively intervening in society to protect. Although positive obligations are (correctly) regarded as correlative to both 'negative' and 'positive' rights, these two kinds of rights are not the same and that is necessarily reflected on the latter being conditional on availability of resources, since they are in essence rights pertaining to distribution of wealth (rights of distributive justice or social rights/rights of social justice[174]).

---

[171] This is precisely what gives grounds to views seeing human rights as standards of behavior.

[172] I am assuming the 'interest' theory rather than the 'will' theory of rights as correct. The 'interest' theory of rights maintains that rights are powers that protect certain interests. I thus understand legal rights as powers granted by the law to physical (people) and legal (companies) entities for the protection of interests which the legislator regards worthy of protection. The 'will' theory of rights maintains that a right is an option or power of waiver over the enforcement of a duty, and the right holder is the person who can demand performance or waive the duty, who can choose to sue or not sue. But such powers are not generally exercised by children, as MacCorcmick's observed, nor by many mentally challenged individuals. The enforcement of duties which are owed to children is not left at the discretion of children or mentally challenged individuals but rests in the parents or their guardians. Therefore, according to the 'will' theory, children do not have rights. Assuming they do, the will theory is false. Indeed, Hart who defended the will theory (before MacCormick) maintained that it is a mistake to ascribe rights to babies, at least. Indeed, Simmonds is right to observe that respect for rights is not the only possible basis for morality, as there are also duties of love and compassion to which rights are irrelevant. However, not only it is intuitive to regard that a baby, as a human being, has the right to not be killed arbitrarily, not be tortured, etc. it would be hard, if not impossible, to determine the specific point in time where a baby would grow old enough to be entitled to moral rights. It is inconsistent to hold that at a specific moment in time, a baby/child suddenly obtains moral rights. For details see Nigel E Simmonds, *Central Issues in Jurisprudence* (5th edn, Sweet & Maxwell 2018), 323-33, especially 331.

[173] It needs to be stressed that the primacy is strictly logical, not a matter of significance. In theory, there is no trade-off between civil and political rights on the one hand and socio-economic rights on the other. None is more important than the other. We need the right to food to enjoy our life. We need right to food so we can enjoy freedom of expression. We need freedom of expression so we can highlight violations in adequate standards of living.

[174] In the contemporary public domain, 'social justice' is broader than 'distributive justice' as the former also includes issues irrelevant to this discussion, such as combating racism and gender bias. For the purposes of this discussion, social justice 'is essentially the same as that in which the expression 'distributive justice' had long been employed. It seems to have come generally current in this sense at the time when (and perhaps partly because) John Stuart Mill explicitly treated the two terms as equivalent…' Friedrich A. von Hayek (author), Chiaki Nishiyama and Kurt R. Leube (eds), 'Social or Distributive Justice' in *The Essence of Hayek* (Hoover Institution Press 1984), 63 where the relevant statements of John Stuart Mill are also stated.

1. Justice – an essentially contested concept

Ignoring this distinction when discussing individual rights and social rights causes intellectual confusion, a manifestation of which is reflected in the use of the term 'justice'. Before Rawls' *A Theory of Justice*, 'justice' meant respecting individual human rights. It had a clear meaning. When one person violated another person's rights, he treated him unjustly. A person treated another person unjustly only by violating his rights. The government treated a person unjustly only by violating his rights or failing to protect them, e.g. the slave's liberty rights. Rawls recognizes this traditional meaning of justice in passing in *A Theory of Justice*, but then goes on to use the term differently, arguing that it is sufficiently similar to the traditional meaning. But it is not. Rawls argues in *A Theory of Justice* that certain patterns of distribution are unjust (progressive definition). According to him, for example, it is unjust that people of equal talent and motivation should have very unequal chances of success based on differences in their parents' wealth. However, this is not unjust according to the traditional conception because one person does not violate another person's rights simply in having advantages or giving their children advantages. Thus, the two conceptions of justice do not overlap, and they are not sufficiently similar. Social and economic rights have to do with distribution of wealth. Injustice, as traditionally understood, is a property of actions, not distributions. It is not the case that the one conception is right and the other wrong. Neither the traditional, nor the progressive conception of justice is confused. What is confused is the thought that theft and inequality are wrong in just the *same way*: in being unjust.[175]

Hayek accepts the traditional understanding of justice and rejects the notions of 'social justice' and 'global justice' as fundamentally confused. John Stuart Mill states that "society should treat all equally well who have deserved equally well of it' and that 'it is universally considered just that each person should obtain that (whether good or evil) which he deserves; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve." Such statements which connect social and distributive justice with how society treats individuals according to their deserts bring out most

[175] This point was brought to my attention by Professor Peter de Marneffe, Professor of Philosophy at Arizona State University.

clearly its difference from pure justice, and at the same time, the cause of the vacuity of the concept: the demand for social justice is addressed not to the individual, but to the society in the strict sense, i.e. separated from the apparatus of the government. As such, the society is incapable of acting for a specific purpose. Therefore, the demand for social justice becomes a demand that the members of society should organize themselves in a manner which makes it possible to assign particular shares of the product of society to the different individual or groups.[176] This is why he believes that 'social justice' as is used today is not 'social' in the sense of 'social norms', i.e. something which has developed as a practice of individual action in the course of social evolution, not a product of society or of a social process, but a conception to be imposed upon society.[177] The primary question then becomes, he continues, whether there exists a moral duty to submit to a power which can co-ordinate the efforts of the members of the society with the aim of achieving a particular pattern of distribution regarded as just.[178] Many theorists of social justice start from the assumption that satisfaction of needs ought to be shared and that would require equal shares for all in so far as special considerations do not demand departure from this principle.[179] However, the prior question is whether it is moral that people are subjected to the powers of direction that would have to be exercised in order that the benefits derived by the individuals could be meaningfully described just or unjust. Because the burdens and benefits are apportioned by the market mechanism and are not the result of deliberate allocation to particular people, Hayek answers this prior question to the negative. The shares of each one of us in society is the outcome of a process, the effect of which on particular people was neither intended nor foreseen by anyone when the institutions first appeared.[180] Indeed, when it comes to justice in the sense of individual rights, there is an answer as to who is has been unjust: the perpetrator of rights. By contrast, "our complaints about the outcome of the market as unjust do not really assert that somebody has been unjust; and

[176] Friedrich A. von Hayek (author), Chiaki Nishiyama and Kurt R. Leube (eds), 'Social or Distributive Justice' in *The Essence of Hayek* (Hoover Institution Press 1984), 63-64.
[177] Ibid, 78.
[178] Ibid, 64.
[179] See, e.g. Antony M. Honoré, 'Social Justice' [1962] VII McGill Law Journal and revised version in *Essays in Legal Philosophy* (Robert S. Summers ed, University of California Press 1968), 62 of the reprint: 'The first [of the two propositions of which the principle of social justice consist] is the contention that *all men considered merely as men and apart from their conduct or choice have a claim to an equal share in all those things, here called advantages, which are generally desired and are in fact conducive to well-being*.' Also Walter G. Runciman, *Relative Deprivation and Social Justice* (Routledge & Kegan Paul 1966), 261. Both in Hayek (author), Nishiyama and Leube (eds) (n 176), 64 note 8.
[180] Ibid, 65.

there is no answer to the question of *who* has been unjust. … There is no individual and no cooperating group of people against which the sufferer would have a just complaint, and there are no conceivable rules of just individual conduct which would at the same time secure a functioning order and prevent such disappointments."[181] "The general failure to see that in this connection we cannot meaningfully speak of the justice or injustice of the results is partly due to the misleading use of the term 'distribution' which inevitably suggests a personal distributing agent whose will or choice determines the relative position of the different persons or groups. There is of course no such agent…"[182] [183]

---

[181] Ibid, 69.

[182] See Ludwig von Mises, *Human Action* (Yale University Press 1949), 255 note: 'There is in the operation of the market economy nothing which could properly called distribution. Goods are not first produced and then distributed, as would be the case in a socialist state.' Cf. also Murray R. Rothbard, 'Towards a Reconstruction of Utility and Welfare Economics' in Mary Sennholz (ed), *On Freedom and Free Enterprise* (New York, 1965), 231; both in Hayek (author), Nishiyama and Leube (eds) (n 176), 72.

[183] It is hard to not notice the resemblance with Adam Smith's invisible hand, which is 'nothing more than the automatic equilibrating mechanism of the competitive market.' Michel Rosenfeld, 'Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory' (1985) 70 Iowa Law Review 769, 875. Adam Smith's economic theory comes after the drawbacks of traditional contract theory. Hobbes' theory is problematic because in order to address the issue of society continually being on the verge of war, Hobbes is persuaded that absolute monarchy is preferable to democracy or aristocracy, so that a single source, a commander-in-chief, is in full control of the army. Since the only duty of the absolute monarchs is to refrain from taking the lives of the citizens, the monarchs can legitimately interfere with their subjects' contractual relations – the ultimate purpose for which civil society was presumable established is thereby undermined (865). Lock's theory fails because since Locke maintains that duties are delegated to the government, 'in the absence of natural rights transcending all social and political bonds, government as a trust may well be too weak to sustain civil society for too long' and authority of the trustee to enforce contracts depends entirely on the arbitrary will of the majority, so enforcement of contract relations may be as uncertain as in the Hobbesian state (867). Rousseau, by maintaining that each individual has a dual role, member of the sovereign toward other individuals on the one hand and member of the governed body toward the sovereign on the other, and that the social contract is between each individual *qua* individual on the one hand, and society as a whole (of which each individual is but a part) on the other (867), reintroduces the split between the individual and the society to within the individual. 'This displacement of the fundamental rupture inherent in traditional social contractarianism resolves one set of problems by posing a series of new ones.' (868) 'The dissociation of man from citizen means that two different sets of criteria govern the individual's conduct' so when the two pursuits directly conflict, the private interests of the individual must yield to the public interests of the citizen, and if an individual refuses to give up these private interests, the body politic is justified in forcibly compelling the individual's adherence to the general will: 'whoever refuses to obey the general will shall be compelled to it by the whole body' (869). The voluntary sacrifice of the man to citizen a per Rousseau presents the logical conclusion of individualism as being totalitarianism. 'Compounding the disturbing aspects of this belief is Rousseau's hopelessly antiquated view of the economy, according to which one man's wealth comes directly from the impoverishment of another – any increment in one's wealth automatically entails a corresponding diminution of the wealth of another, so reconciling the private interest of the individual to the public interest appears impossible (971-872). 'The premise that all humans are born equal seems to preclude, at least prima facie, the notion that distributive justice is achieved by means of a social contract that establishes or perpetuates inequality in the possession of wealth. If all individuals are inherently equal, why should some volunteer to be perpetually delegated to an unequal, inferior position? It may seem that attempts to bridge the gap between man and citizen, private interest and public interest, and individual desire and the common good, through use of the social contract are headed either towards the suppression of individual freedom -when directed to subordinating individual interests to the common good - or toward the perpetual denial of distributive

This in no way constitutes an attack against social policies or social rights; the claim is a conceptual one, not political. Rights of distributive justice are important for a society which cares about the interests and minimally decent life of everyone. It is of course necessary for all states to have policies regarding distributive justice to alleviate the suffering of people in need. An extreme focus on individual rights with complete disregard for social rights may lead to libertarianism where certain people, due to bad choices or bad luck, are left untreated. The contrary, extremely deep intervention of the government in the economy and society more generally, would lead to totalitarianism. Neither extreme is desirable; both kinds of rights are necessary and serve a purpose. It is most certainly important and necessary in a society that social policies and welfare are provided and that there is a safety net, i.e. a safeguard against hardship or adversity, for the obvious humanitarian reasons. Hayek himself agrees with such social policies:

> There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend. To enter into such an assurance against extreme misfortune may well be in the interest of all;

---

justice - when focus on preserving private interests at the expense of common interests.' (872) Escaping this vicious cycle rests on justification of the proposition that increments in the wealth of individual leads to an increase in the general welfare of society as a whole. This is where Adam Smith's economic theory comes in. 'Combining the individual's exclusive pursuit of self-interest with his or her lack of self-sufficiency leads to competition, which surprisingly enough, is what binds the fabric of society together. Competition, for its part, ensures the most efficient allocation of goods and services within society, and thus provides the most satisfactory solution to the problem posed by the lack of individual self-sufficiency.' But regulation is needed in order to prevent perfect-hungry individuals from exacting exorbitant prices from society. Individual self-interest can lead to the common good "only when it is mediated through confrontation with their self-interests of other individuals.' In the context of an economic marketplace, this confrontation is called 'free and universal competition.' Competition, in turn, is also regulation because 'for each individual in the market who seeks to maximize profits without regard to social consequences there are a great number of similarly situated individuals with precisely the same goal' who can drive them out of the market. Competition is market's self-regulator, arising automatically and inevitably from the clash of conflicting individual self-interests. Competition is a famous 'invisible hand.' (874) It ought to be stressed that no case is made here for libertarianism, a society with minimal state. Governmental intervention in the economy is desirable for the protection of the vulnerable. Also, even under 'optimal conditions, which include a free market economy fueled by atomistic competition, the individual's right to autonomy is safeguarded by the existence of equality in bargaining power. The welfare of each individual is made possible by the silent operation of the invisible hand of competition.' (ibid 896) Since, as a matter of fact, in the non-ideal but real societies we live in there is sometimes no equality of bargaining power, even more so nowadays as more and more atomistic competition is displaced by corporate capitalism, governmental intervention in the economy is in some cases justified. The point made here is with the narrative, the rhetoric used: the term 'distributive justice' creates an anthropomorphic presentation which creates conceptual confusion.

> or it may be felt to be a clear moral duty of all to assist, within the organised community, those who cannot help themselves.[184]

The mistake is regarding such assurances as justice, because that entails there is someone to be blamed for, a perpetrator of injustice, which is absent here. Equality of opportunity does not entail equality of outcome. It is desirable to have policies in place to provide a certain minimum protection to all, make sure all people have housing, food, etc, and thus lessen gross inequalities of outcome for pure humanitarian concerns. However, although this may well be a moral requirement toward our fellow human beings, it is wrong to assume that this is a requirement of justice per se, as that would be misconceiving the market as relying on a non-existent anthropomorphic distributor, since it is essential for justice that there is a perpetrator. It is a conceptual mistake. Equality of opportunity makes no claims regarding equality of outcome. The latter is also dependent on luck. Conflating justice with reducing inequality of outcome is also tantamount to confusing different notions of fairness.

There is much confusion about the notion of fairness. In general, we can understand unfairness as arbitrariness. However, there are two very different kinds of arbitrariness: cosmic arbitrariness and personal arbitrariness. If I have arbitrarily disfavoured someone in some process, then I have treated him/her unfairly, which is unjust. If only fate has disfavoured him/her, then no one has treated him/her unfairly or done him/her any injustice. Hayek identifies that social justice advocates often seem to argue as if cosmic arbitrariness is an injustice which needs to be corrected. However, on the traditional conception of justice, only personal arbitrariness is an injustice.[185]

It thus seems, so far, that 'social/distributive justice' and 'justice' are two different concepts, not conceptions of the same concept. Justice is protection or at least not violation of individual human rights, in the case of which unjust acts necessarily require a perpetrator, whereas distributive or social justice pertains to distribution of wealth with no perpetrator of injustice. Using the term 'justice' to refer to distributions is

[184] Hayek (author), Nishiyama and Leube (eds) (n 176), 87.
[185] Rawls clearly recognized the distinction, but some of his arguments seem to presuppose that cosmic arbitrariness is an injustice. So he did not always keep the two kinds of unfairness distinct. The points made in paragraph were pointed out to me by Professor Peter de Marneffe, Professor of Philosophy at Arizona State University.

confusing because it creates the false impression that there is a distributing agent whereas there isn't one. It can also be regarded as manipulative because it seems to suggest that everyone is guilty or open to blame if these distributions exist, so as to motivate people to act so as to change the distributions. However, even if the distributions are unjust in the extended sense of being prohibited by rules that are necessary to protect important interests, it does not follow that anyone is open to blame for them or that anyone should feel guilty. I, an individual, cannot control the distribution of wealth. The distribution of wealth does not result from any action of mine. Therefore, I am not in any way to blame for inequalities in the distribution of wealth and should not feel guilty for it.[186]

This is true even of government officials. Unless a government official has sufficient power to prevent the objectionable inequalities, he is not to blame for them. It is not even true, arguably, that legislators have a moral duty to vote for policies that eliminate these inequalities. Suppose that an inequality is impermissible because it is prohibited by some valid moral rule. Suppose either that there are enough votes, however, to prohibit it without my vote or that even with my vote there will not be enough votes. Do I have a duty to vote for a law prohibiting it? This is questionable. The old-fashioned use of 'injustice' entails that someone did something wrong, something for which they should feel guilty, something they should not have done, something disrespectful to others that calls for redress or apology. This is not true of the new use of 'injustice'. So, although it is used because people think of it as a serious criticism that will motivate people to act, it does not actually entail that anyone has done anything wrong or that they have any duty to act to change things. For this reason, the term appears to be manipulative and intellectually confused.

Therefore, if justice is defined as protecting human rights, it is not an essentially contested concept. There is a perpetrator in any instance of violation of rights/injustice, so social rights which call for distribution of wealth are simply a different concept, not a conception of the concept of justice. Therefore, justice in terms of protecting or at least not violating human rights is not an essentially contested concept and includes only individual rights.

[186] This was pointed out to me by Professor Peter de Marneffe, Professor of Philosophy at Arizona State University.

On the other hand, Aristotle drew a distinction between rectificatory[187] and distributive justice. This is because distributive justice employs geometric proportion: what each person receives is directly proportional to his or her merit, so a good person will receive more than a bad person. This justice is a virtuous mean between the vices of giving more than a person deserves and giving less. Rectificatory justice remedies unequal distributions of gain and loss between two people. Rectification may be called for in cases of injustice involving voluntary transactions like trade or involuntary transactions like theft or assault. Justice is restored in a court case, where the judge ensures that the gains and losses of both parties are equalled out, thus restoring a mean.

It becomes obvious then, that Aristotle did distinguish two kinds of justice, but in doing so, he understood justice quite differently. Justice for Aristotle is not protecting or at least not violating human rights – importantly, human rights were not developed as a concept back then as they are today-, but more abstractly 'giving each person his or her due.' Individual human rights constitute a specification of 'giving each person his or her due.' But then again, so do social rights. It is in this sense that they are entitlements, even though there is no perpetrator of injustice if they are not given. Justice, for Aristotle, is stipulated in a higher level of abstraction. There is a commonality between rectificatory and distributive justice, giving each one his/her due, which justifies both as categories of justice. Notably, Aristotle correctly understands them as categories of justice, not as conceptions of the same concept. A conception of a concept excludes the other conceptions. The conception of art being what is displayed in art museums and exhibitions excludes by definition art in the streets. Street art is simply not art according to this conception. By contrast, rectificatory and distributive justice, as per Aristotle, are not mutually exclusive. They conflict only if we define justice as protecting or not violating individual human rights, but in that case, as illustrated by Hayek, they are different concepts. If justice is defined as giving each his/her due, then rectificatory and distributive justice are simply two different categories of justice that apply in two different realms, the one in society/interaction between the individual and the society, and the other one in interpersonal interactions.

[187] Also called commutative or compensatory justice. See, e.g. Michel Rosenfeld, 'Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory' (1985) 70 Iowa Law Review 769, 780.

Let's briefly state the conclusions we have reached so far in this part of the discussion. We have concluded that justice in terms of protecting or at least not violating human rights includes only individual rights, whereas social rights belong in distributive justice which may use the same word 'justice' but it employs a different concept, since theft and inequality are not both wrong in being unjust. Similarly, we have also concluded that Aristotle's rectificatory and distributive justice are not different conceptions – let alone essentially contested conceptions – of the concept of justice, but different categories that apply in different realms.

If at this point there is feeling of unease, you are not alone. Indeed, justice in terms of human rights is lower in the level of abstraction than justice in terms of giving each what is worth. The former is a specification of the latter, but it does not exhaust it. It is not the case that giving each what is worth is simply a more abstract way of stipulating human rights protection, because it includes more content. It includes giving someone what is worth, even if that person does not have an individual claim right. That does include distribution of wealth, but it does not necessarily include social rights as per ICESCR, as that depends on one's definition of 'worth.' It could be the case that only veterans of war who defended the country are 'virtuous' and 'worth' of certain entitlements beyond protection of their individual rights. This is where virtue becomes relevant. Therefore, these two conceptions do not communicate. Although they partly overlap, they have, in overall, different content and they lie in levels of abstraction. One can understand justice as being only rectificatory (individual human rights) justice, whereas another can understand justice as being giving each what is due. These are entirely different conceptions of justice that do not communicate with each other. The first person would understand justice/injustice merely as a property of actions, not distributions, whereas the other would understand justice more broadly. The first person would understand injustice as meaning that someone has acted wrongly, whereas the other not necessarily.

It is worth noting that this conclusion exemplifies a point stated previously in the conversation, made by Applbaum: barriers may change. Justice, as per Aristotle, giving each what is due, is not essentially contested but has two distinct categories and is stipulated and understood with conceptual clarity. Human rights narrative has distorted this conceptual clarity. Human rights language, perhaps consequentially also modifying

our moral intuitions, has made us identify justice with protecting, or at least not violating, human rights, thus detaching it from giving each what is due. Human rights, under the traditional conception, are not one category of justice, but *the* justice; they exhaust the entire spectrum of the concept of justice. This creates tensions with distributive justice which now becomes a different concept, renders the 'giving each other what is due' a different conception, and inevitably renders justice as a contested concept. In the absence of an independent argument solving the dispute between these two conceptions of justice (individual human rights and giving each what is worth), since the issue largely depends on one's moral intuitions, justice is an essentially contested concept. Although I favour Aristotle's classification as my moral intuitions match with his conceptual framework and thus do not see justice as an essentially contested concept, I cannot regulate neither language nor people's intuitions and how they are reflected on concept creation; therefore, with the scheme presented above, justice is indeed an essentially contested concept.

This analysis leads the discussion to an important criticism against Buchanan's theory of justice in the sense of protecting human rights as a standard of legitimacy. As we have seen, if justice is defined as protecting or at least not violating rights, social rights do not come under the same category, but under the category of distribution of wealth and we have explained the intellectual confusion of conflating these two. In order to incorporate both rights and distributions under the same concept of justice, it has to be the case that justice is more abstract than protecting rights, i.e. giving each what is his/her due. What is a mistake is to define justice as protecting rights, yet include both individual and social rights under 'justice'. This is exactly what the theory does. If social rights are to be included, the theory ought to be presented as theory of justice, in the sense of giving everyone what they are worth. That would include virtue, as per Aristotle.

Buchanan's theory supports rights of distributive justice as being the same kind as individual rights because they both protect the same interests. 'Our fundamental human interests in well-being and autonomy are served by freedom of speech and the right to political participation, but also by rights to basic health care and education.'[188] There is no doubt that social rights and individual rights pertain to the same interests, because

[188] Buchanan, (n 160), 197.

these are interests of the same human beings. Both individual and social rights pertain to human dignity. It could be argued, in defence of the theory, that human rights are understood as deriving from human dignity and that is a specification of giving each what is due. The theory here fails, however, insofar as it conflates two different questions, namely where human rights come from (our interest in human dignity, well-being), and what sort of entitlements they are. Although they derive from human dignity, they are, as we explained above, different kinds of entitlements.

It is important to note Buchanan corrects this error in his later book *The Heart of Human Rights*. In this later book, Buchanan heavily relies on the distinction between moral and legal rights and makes the following two claims. He maintains that either it is the case that there are moral economic and social rights, or economic and social rights are only legal, but in the right sort of legal system, they have moral force. In any case, and that is the second claim, states have moral obligation to provide legal positive rights. Failing to do so counts against their being legitimate. Therefore, even if rights of distributive justice are only legal, states have moral obligation to enforce them. This position accommodates the criticisms raised in this discussion because it allows for social and economic rights to be merely legal, not moral, and thus leaves the notion of justice unaffected. At the same time, the standard of legitimacy, justice, being essentially contested does not arise, which is why the former theory was chosen for the purposes of this discussion. In *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, even though he is not clear on distinguishing moral and legal rights, Buchanan is mostly thinking of moral rights, as is evident from his explanation of how these rights are derived: human dignity, interests, well-being, rather than powers granted by law for the protection of interests the legislator regards worthy of protection. The main point of his later book is that there are good moral reasons to have international legal human rights, including social and economic rights, and when such justified legal rights are in place, be part of the legitimacy criteria for institutions, including states.

2. Which rights?

In his previous theory that we are discussing here because it best helps us see legitimacy as an essentially contested concept through the essentially contested concept of justice, Buchanan presents human rights as a standard of legitimacy; which human rights in

particular? Buchanan devotes an entire chapter to rights of distributive justice beyond the right to the means of subsistence which is already widely recognized as being included in the theory and maintains that global institutions are currently lacking the capacity to regulate the global basic structure in order to achieve distributive justice. Lack of capacity of institutions is a deficiency which ought to be remedied. The theory understands, however, social and economic rights as part of 'justice in the sense of protecting human rights', thus rendering itself susceptible to criticisms raised above. At the same time, the theory assumes only a short list of very basic rights as the crust of the theory. Buchanan's theory recognizes that not all rights stipulated in the ICCPR and the ICESCR are equally important, because the interests they protect are not equally important. Consider the following the example. The Council of Europe (distinct from the EU, as the Council of Europe legislates through a series treaties) established a conventional access to documents. Treaty 205 established as a fundamental human right a right of access to government information, which becomes effective on deposit of 10th ratification. At the moment of writing, there are only 9. Suppose the 10th ratification is completed. It would indeed be absurd to regard this 'fundamental' human right to access to access government information as equally important as the right to life, to not be tortured and to have a minimum subsistence. The fact that not all interests and thus not all rights are of the same significance implies that not all of them ought to have the same impact as standard of legitimacy.

So, which are, according to this theory, the 'basic' human rights? Buchanan provides a very satisfying answer:

> My hypothesis is that the most basic human rights—those most important for the capacity to live a decent human life—include the following: the right to life (the right not to be unjustly killed, that is, without due process of law or in violation of the moral constraints on armed conflict), the right to security of the person, which includes the right to bodily integrity, the right against torture, and the right not to be subject to arbitrary arrest, detention, or imprisonment; the right against enslavement and involuntary servitude; the right to resources for subsistence; the most fundamental rights of due process and equality before the law; the right to freedom from religious persecution and against at least the more damaging and systematic forms of religious discrimination; the right to freedom of expression; the right to association (including the right to marry and have children, but also to associate for political purposes, etc.); and the right against persecution and against at least the more damaging and systematic forms of discrimination on grounds of ethnicity, race, gender, or sexual preference.

> These rights are acknowledged in the central human rights conventions of the existing system of international law. These same conventions also recognize other rights, but in many cases it would be more difficult to argue that they are necessary conditions for a good human life or at least a minimally decent life. In some extreme cases, such as the notorious right to holidays with pay, it is pretty obvious that they are not necessary for a decent human life, though they may make for a better life for many people.[189]

A few reflections are important. Buchanan gathers these rights from international conventions, mainly the ICCPR and the ICESCR. However, it is not all the rights stipulated in these conventions. He admits that the rights he chose, protect interests which are more important than the interests protected by the rights left out of the list. Which interests are more important that others does not seem like a matter of opinion but an objective claim, a truism: interests protected by these 'basic' rights are 'necessary conditions for a good human life or at least a minimally decent life.' Indeed, although different societies and cultures may have different standards of 'minimally decent', it is quite uncontroversial that the right to not be tortured is more important than the right to holiday pay. If the choice of rights is objective, the selection is more than just a 'hypothesis'.

It is a value judgement. In deciding which interests of the human condition are more important than others, which rights are thus more 'basic' than others, in other words which are the 'necessary conditions for a good human life or at least a minimally decent life', we are making a value judgement. We value the right to freedom of religion more than the right to social security and holiday pay.

The value judgement reveals an extremely important point: the human rights narrative keeps the true standard of legitimacy, i.e. the values/interests we try to protect, hidden. The standard of legitimacy is essentially moral: the moral value/interest of protecting all people from being tortured, arbitrarily killed, detained or imprisoned, etc. By presenting the protecting of values/interests in terms of rights, the theory becomes susceptible to the human rights narrative and thus the interpretation of human rights by courts, which is broad and dynamic, and thus allows for hard conflicts between same and different rights. The value of not being persecuted or discriminated for religious beliefs is uncontroversial, and thus so is the 'right to freedom from religious persecution and

[189] Ibid, 129.

against at least the more damaging and systematic forms of religious discrimination'. The reason why this value/interest/right is uncontroversial is because of the negation of discrimination, i.e. the equality/fairness premise. Being discriminated because of religious beliefs is unfair. This is a negative right against discrimination. Even positive obligations which may be entailed, such as having a judicial system protecting people against such discriminations, aim at *non*-discrimination.

However, when this value is entangled in the human rights narrative, it is broadened to a problematic extent. In our example, the right to not be discriminated because of religious beliefs becomes the vague 'right to freedom of religion'. This is much higher in the level of abstraction, it is more unclear what obligations are entailed by it and it causes conflicts with other rights, such as the right to freedom of expression, which are resolved by courts, which will have to add on to these values, other values which are not equally uncontroversial, and perhaps not legitimate. Therefore, presenting values/worthy of protection in human rights narrative may lead legitimacy to illegitimacy.

Let us take an example, which may be repeated as a theme of the argument. Drawing comics of an important figure of a religion may offend some religious people who thus feel that their right to freedom of religion is violated. The court thus will even restrict the right to freedom of expression to the extent that such comics are not permitted, or will restrict the right to freedom of religion to the extent that such comics are permitted and religious people have to tolerate it. Therefore, if both rights are included in the standard of legitimacy, any decision will be both legitimate and illegitimate. Of course, there is no conflict of law because the court will do just that: delineate rights. It will decide which specific claim rights and correlative obligations, here the right to draw comics of religious entities and the obligation to tolerate religiously offensive manifestations of right to freedom of expression on the one hand and right to not accept your religion to be offended with the correlative obligation to not draw comics of religious entities, are included in the right to freedom of expression and right to religious freedom respectively.

This problem seems absent if we protect the interests/values per se. The value of not being prosecuted because of religion does not conflict with the value of expressing our thoughts, beliefs and ideas freely. Expression is not persecution. However, once

values/interests are translated into human rights language, the right to not be persecuted because of religion (correlative obligation to not persecute anyone on the grounds of religion) becomes a broader vague right to freedom of religion (unclear what the correlative obligations are). The high level of abstraction of rights includes different contested conceptions of protected values: one conception of religious freedom understands it as prohibiting manifestations of freedom of expression which offend religion, whereas a different conception does not. There is no independent substantive argument that resolves the dispute between these two conceptions. The answer partly depends on one's metaphysical beliefs and it is thus essentially a political decision courts make. To claim legitimacy, we have to rescue human rights, rather say values/interests that human rights protect, from the human rights narrative.

With these reflections in mind, I will now present the three parts of the theory and raise some further criticisms, showing the difficulties that a theory with a standard of legitimacy which is itself essentially contested faces.

4.2.3.2. Justice

Justice, being the crux of the theory, is a commitment this theory makes, with three claims:

1. The normative claim that justice is a value that should be a primary moral goal of the international legal system.
2. Justice is not a morally permissible, but morally obligatory goal of the international legal system.
3. Taking seriously the idea that justice is a primary, morally obligatory goal of the international legal system requires a particular conception of the state.[190]

1. Peace or Justice?[191]

A simple reading of the UN Charter and common understanding of the UN-based international legal order yields the understanding that the primary goal of the post-WWII international legal order is peace and stability. Buchanan argues that even if this

[190] Ibid, 73-74.
[191] Ibid, 76-82.

is still the case, the primary goal of international law *ought* to be justice. Indeed, peace, being merely the absence of war, is compatible not only with unjust status quo, but also with 'unspeakable violence within states – systematic torture perpetrated by governments against their own citizens, pervasive violence against women, ethnic cleansing of minorities, even genocide.'[192]

Peace, being as desirable as common-sense dictates, is a goal Buchanan presents as not *essentially* in conflict with justice.[193] Justice requires the prohibition of wars of aggression (morally unjustifiable attacks as opposed to justified wars of self-defence or humanitarian intervention) because they inherently violate human rights. To that extent, the pursuit of justice is the pursuit of peace. Furthermore, in terms of relations within states, protecting some important human rights *is* securing peace, such as with the right of securing the person and prohibition of torture.

In order to establish the claim, however, that justice, instead of peace, is the primary goal international law ought to have, the theory must justify this primacy in the instances where these two goals, peace and justice, do conflict. Buchanan tries to justify this primacy with two grounds and a qualification. The first ground is a historical example which indicates that sometimes it is required to break the peace among states for justice. Quite unsurprisingly, the example is the Allies in WWII having fought to stop fascist aggression with all its massive violations of human rights.[194] Indeed, there could be peace in the Nazi-occupied areas, had the Allies not invaded. The Allies did prevent such peace for the protection of the most basic human rights. The second ground is that examples of clashes between peace and justice show "not that justice cannot be a primary goal of the system that takes the value of peace seriously, but only that clashes between these goals can be expected to occur during the transition toward justice."[195] For example, it is justified, on the grounds of justice as protecting basic human rights, to use military force to oust a junta.[196] Finally, Buchanan tries to justify the primacy of justice as the primary goal of international law with the following qualification. In his own words:

[192] Ibid, 77.
[193] Ibid, 79.
[194] Ibid, 78.
[195] Ibid, 80.
[196] Ibid, 79-80.

> a sincere commitment to justice as primary goal of the system does not require allowing considerations of justice to trump all other moral considerations in every instance. For one thing, not all injustices are serious. In some cases it may be morally permissible to tolerate a relatively minor injustice or forgo a reform that would further improve a situation that is already commendable from the standpoint of justice, in order to reap some significant gain, not just with respect to some other moral value, but also in efficiency. My view is only that the core of justice, protection of basic human rights, should be a primary goal of the international legal system. This is compatible with the realization that justice is not all that matters.[197]

Notably, this is a strength and weakness of the theory. It is a strength because it puts justice and peace at their place. We all agree that an unjust status quo is not desirable. We all agree that peace under occupation by foreign power is undesirable and use of force is morally permissible if it is the only path to freedom. However, note that in arguing for primacy of justice over peace in such instances, the conception of justice we are assuming is not the one of protecting fundamental human rights and making the individual the centre of international law as the theory purports, but a conception pertaining to the freedom of a collective (society, ethnic group, etc) from external rule: it is not 'fair' to accept an unfair status quo, a peaceful order maintained by a foreign power which invaded. Historically speaking, unjust status quo pertained to ethnic identities - Persians invading Greeks, Mongols invading Asian nations, Ottoman Turks conquering the Balkan and eastern European nations, colonial powers ruling foreign lands etc. – and this lack of 'justice' was the ground for subsequent wars of independence. When a group/ethnic identity was fighting for freedom from external rule, it was assuming that the legally valid order may have established peace, but it was unjust because it had invaded their land. Wars of independence assume an unjust status quo. The theory cannot accommodate this conception because the rights belonging in the crux of the theory are, with the exception of the right to subsistence which pertains to distributions of wealth in a society, individual rights, not in an unjust status quo after usurpation of land. The theory is very clear about making the individual, contrast to state, central in international law and this is reflected in the conception of justice. The theory does not accommodate the typical instances of unjust status quo.

[197] Ibid, 80-81.

Another immediate reflection on the theory, which does not in way disprove it, is that one ought to be careful not to get entangled in the relevant rhetoric. It is indeed true that unjust status quo is morally impermissible, and it is desirable to fight against a peace which either violates fundamental human rights or consists on occupation of a land from a power which has invaded. What is also true is that although the latter cases are more obvious than the former. It is not the case that every time a state has invoked human rights as a justification to invade, the justification was actually true. It is often actually the opposite. More often than not, human rights rhetoric has been used as an excuse to break peace, but not for justice, but for injustice, not to protect human rights, but to illegally invade a state and violate human rights. Adolph Hitler used the justification of human rights of German citizens who were oppressed to invade neighbouring states with the subsequent human rights violations. Turkey used the same excuse to invade Cyprus a week after domestic tensions had ceased, to illegally occupy 38% of a sovereign state with the subsequent human rights violations ranging from 250 000 refugees, frequent rapes (which lead Cyprus to modify the law on abortion) and destruction of cultural property, and establish a regime recognized by two UNSC legally binding resolutions as illegal, and implement its future plans for the region as drafted by Nihat Erim in 1952. Certain western states used human rights (rapes – one of the three myths, another one being democracy as mentioned before) as justification to attack Libya and take out Qaddafi even though there was no evidence of the Qaddafi regime committing the claimed human rights violations. There are probably more examples of misuse of the 'justice over peace' argument than actual implementations of it, often because states which are able to restore justice over an unjust peace are the ones that caused the unjust status quo at the first place or have interests for unjust peace to remain in place. Becoming too entangled in the rhetoric makes one assume that there are human rights violations whenever human rights violations are advanced. There is a distinction between whether certain states *claimed* that human rights violations took place and they are attacking for the sake of human rights, and whether there have *indeed* been human rights violations and the attack is *indeed* to protect human rights and bring justice. Again, this reflection does not attack the theory. It does, however, set it in perspective. The claim is that what has priority over peace is justice, not whatever states *claim* that constitutes justice. In terms of public international law, states are legally permitted to even advance justification for attack after the attack. However, the point here is whether the justification is true or false. Wars of aggression being illegal has led to states using

justifications of public international law, language of public international law, to justify their illegal attacks. Such justifications are self-defence (also used from Adolph Hitler when invading Poland) and protection of human rights. The fact that a justification has been presented, it does not mean that it holds true.

Returning to the theory, in arguing that in some cases it may be morally permissible to tolerate relatively small injustices for other moral values or efficiency, the critical question becomes which rights or how much injustice must be sacrificed for what/how much value or efficiency. Stated at such a high level of abstraction, the theory finds Hitler, Stalin and Mao, paradoxically enough, agreeable. The first violated the right to life of many physically incapable people for efficiency (since the state providing for them as they were unable to work would be inefficient), whereas the second and the third exterminated even more people, violating their right to life, but they did for a moral value, such as social cohesion. Although the theory surely intends to negate such entailments, the high level of abstraction in which it operates does not allow it to do so, as the theory becomes all-encompassing: any violation of rights can be regarded as serious or not serious if there is no hierarchy of human rights. In assuming that arbitrary killing of an individual is morally worse than not giving social security to an individual (both human rights), we are assuming that the interest of being alive is more important than the interest in obtaining social security, which in human rights language translates to the assumption that the right to life is more important than social security. I am not advancing a hierarchy of human rights, nor am I certain that it is even possible. I am claiming, however, that given the vast array of 'human rights,' the high level of abstraction in which the theory operates deprives it of substantial meaning. For justice to be a normative standard, some qualification is needed for what counts as 'serious' injustice. In the absence of that, anyone's own moral intuitions can be projected into 'seriousness' of an 'injustice,' rendering the theory a mere rhetoric rather than an actual standard of legitimacy. Different moral intuitions can lead to different conceptions of 'serious' injustices and in the absence of an independent argument solving a dispute between competing conceptions, the concept of justice in the context of this theory easily becomes essentially contested. Is the injustice incurred on Tibetan people by the Chinese government which, after invading and occupying Tibet, violates their right to rule themselves 'serious' enough that would justify the use of force of Tibetans against the Chinese rule, thus violating peace in pursuit of justice? Or would such a fight for

freedom be more unjust than the injustice already in place because at least some people, probably both combatants and non-combatants as is often the case, will be killed? If by justice in such cases one means the freedom of people native to a land to rule themselves, an intuitive understanding of justice which applies in context, the answer is obvious: if the only way for Tibetans to be free from an invading and occupying power is the use of force, then they are morally entitled to it. In the absence of any such moral *value* that would give this normative standard some content, justice as protection of *all* human rights is more of an abstraction rather than a standard of legitimacy.

At this point Buchanan moves from arguing that 'it is reasonable to make justice a primary moral goal of the international legal system – that a proper appreciation of the value of peace does not preclude us from attempting to make the international order an instrument for and an embodiment of justice' to the stronger claim that doing so is morally obligatory.[198] Given that both claims are normative 'Justice should be the primary goal' and 'Justice is morally obligatory,' the difference between them seems to be in the relevant sense of 'should': the arguments mentioned so far can be regarded as arguments of reasonableness, whereas claiming that justice is morally obligatory requires moral obligation. The use of moral obligation here raises issues, which I will address further on. Buchanan presents an argument for this stronger claim, central to the theory, to the examination of which I will now proceed.[199]

2. The Natural Duty of Justice Argument

According to this argument, we all have a limited moral obligation to contribute to ensuring that all persons have access to just institutions, where this means primarily institutions that protect basic human rights.[200] (The modifier 'Natural' signals that this obligation attaches to us as persons, independently of any promises we make, undertakings we happen to engage in, or institutions in which we are implicated).[201] Buchanan maintains that "if we add to the assertion that there is such a Natural Duty of Justice the premise that international law can play an important role in ensuring that all persons have access to just institutions, we get the conclusion that justice is a morally

[198] Ibid, 83.
[199] Ibid, 85.
[200] Ibid, 86.
[201] Ibid.

obligatory goal of international law."[202] He also emphasizes that his Natural Duty of Justice demands more from us than Rawls' principle with the same label, as that 'requires that one support *just* institutions that (already) *apply to one*.[203]

The Natural Duty of Justice rests on three premises, one factual and two moral. The factual premise is that just institutions (including legal institutions) are required to ensure that all persons are treated justly. The first moral premise is that all persons are entitled to equal respect and concern - or, in Kant's terms, that each is to be treated as an end. Buchanan calls this premise the Moral Equality Principle (or the Equal Moral Consideration or Equal Regard Principle). The second moral premise is that treating persons with equal concern and respect requires helping to ensure that they are treated justly, where this primarily means helping to make sure that their basic human rights are not violated (not merely refraining from violating them ourselves).[204]

Buchanan regards the factual premise as 'unproblematic';[205] yet, it is important to make two important observations. Although all human beings have certain common interests, not all human beings are in need of the specific rights which protect those interests because people stand differently towards certain interests. All human beings have interest in not being arbitrarily killed or tortured. All human beings have an interest in enjoying at least minimum standard of living – thus the right to social security. However, the fact that all human beings have an interest in enjoying at least a minimum standard of living does not entail that all human beings satisfy the conditions of the right to social security. Many do not need it because their individual circumstances provide for a standard of living higher than what is regarded as minimum and claimed for by the right to social security. Giving social security to some and not to others is differentiating treatment based on individual circumstances, depending on which people's interest is violated and which people's interest is already satisfied. This leads to the conclusion that 'all persons being treated justly' does not entail same treatment to all persons. It entails that all persons are entitled to a *minimum* level of protection, that human rights are about that minimum and that in the case of at least certain rights, such

[202] Ibid. Note that even though at the beginning the theory defines 'international law' as global law-making institutions, here 'international law' is referred to as something different from institutions, since it is what ensures that people have access to institutions.
[203] Ibid, 87.
[204] Ibid.
[205] Ibid, 88.

as the right to security, the individuals whose interest is violated – individuals whose living conditions lie below that minimum - have the right, whereas the individuals whose interest is not violated – individuals whose living standards are above that minimum - do not have the right to social security. The first observation then is that what all human beings equally have in common is certain interests, not all the rights that protect those interests.

The second observation is that what the factual premise does not address is the possibility where it is, as a matter of fact, impossible to treat all people justly, and in order to satisfy the interests of some persons, the interests other persons have to be violated and vice versa. What if, in order to satisfy the interests of freedom of movement of people, illegal immigrants who arrived by state-organised illegal emigration after an invasion ought to return to their country? If they return to their country having lived in the invaded county for a significant amount of time, their interests are harmed, whereas if they stay, the interests of the legal citizens are harmed. There is no middle way which can satisfy the interests of all and thus treat all persons 'justly', assuming that 'justly' means satisfying the interests that all basic human rights protect. A perhaps clearer example would be a more straightforward conflict of rights (and interests): freedom of expression vs religious freedom. If comics making fun of religious symbols are permitted, the freedom of expression is protected but the right to religion is restricted, and the other way around. If such comics are prohibited, the right to religion is protected and religious people of the religion in question are treated 'justly', whereas others are treated unjustly, to the extent that their freedom of expression is restricted. What if the only way of protecting the life of millions is torturing one? The problem of the theory is that it is sometimes impossible, as a matter of fact, to treat all people justly, because sometimes, the only way to ensure that some people are treated justly is to treat certain others unjustly. The issue becomes even more complicated if we bring in public interest, which is also a legitimate interest, and a typical restriction of human rights. It is indeed 'unproblematic' to state the moral claim that all people should not be discriminated against/mistreated/disrespected because of their skin colour, race, ethnic identity, sex, gender, religious, linguistic and/or sexual identity. However, this claim is different from the claim that institutions are required to ensure that all persons are treated 'justly', if justice is understood as protection of a long list of all basic human rights which are interpreted as entailing positive obligations not

obviously arising from the letter of the law. Indeed, in order for this theory to succeed and avoid such internal conflicts, justice has to be defined as a very short list of the very basic human rights – freedom of religious discrimination rather than the broader and vaguer 'freedom of religion'. We will see later that the theory indeed keeps the list short and the rights narrowly construed. However, the theory also allows for extension of the list, broadening of the concept of justice, without realizing the implications.

The second premise presents the same issues with the first premise. It is most certainly true and hopefully uncontroversial that there is a certain kind of respect and concern we owe to any human being in virtue of him/her being a human being. There are indeed certain things that we are not allowed to do, and ought to not be allowed to do, to people, in virtue of the fact that they are human beings. If 'basic human rights' are kept to a short list of the truly fundamental human rights that the theory uses to make its case, such as right to life, prohibition of torture and right to non-arbitrary arrest, then the premise is unproblematic. Neither the negative nor the limited positive obligations of these rights conflict in a manner that is restrictive of freedom. If, however, basic human rights are proliferated and/or construed high in the level of abstraction thus broadly entailing many more positive obligations, then it will sometimes be the case that showing *that* amount of respect and concern to certain individuals will entail depriving some of that respect and concern to others – either in terms of the same right or a different basic human right. In order for the premises to be consistent, the 'basic human rights' requirement needs to be concrete.

The third premise requires justification. Buchanan seems to derive the third premise from the second. In particular:

> Consider first the implausibility, if not the outright incoherence, of acknowledging the Moral Equality Principle, that we ought to accord all persons equal concern and respect, while at the same time denying that we are obligated to bear any significant costs to help ensure that their basic human rights are protected. This combination of views would be plausible only if a proper equal respect and concern for persons required only that we do not ourselves violate their human rights, leaving us entirely free to refrain from helping to prevent others from violating those rights, even when we could do so without significant cost to ourselves.

> Suppose, for example, that I do nothing to violate your human rights, stating that I do so out of equal concern and respect for you, out of a proper recognition of the fact that you are a person. But suppose also that someone else is intent on violating your most basic human rights and I can help prevent you from being treated unjustly, without incurring serious costs to myself—all I need do is to help support a police and court system that will prevent you from being murdered by people who hate you because of the color of your skin or from being persecuted because of your religious beliefs. If I refuse to make such efforts to prevent you from having your most basic human rights violated, can I reasonably expect you or anyone else to believe me when I say that I respect all persons and am concerned about their well□being?
>
> Only a laughably anemic conception of what it is to recognize the moral importance of persons—an absurdly attenuated view about what it is to respect persons and to be concerned about their well□being — would count my merely refraining from violating other persons' rights as sufficient. Of course it is another matter as to whether or under what conditions I ought to undergo sacrifices to help ensure that other persons' basic human rights are protected. But the Natural Duty does not generally require sacrifices.[206]

Therefore, the derivation of the third premise, the limited moral obligation to ensure that all persons have access to just institutions, primarily institutions protecting basic human rights, when no sacrifices are required, consists on the observation that it not being the case would render the Moral Equality Principle meaningless. The Natural Duty of Justice is part of the meaning of the Moral Equality Principle. The respect that the Moral Equality Principle requires seems to imply that we have the Natural Duty of Justice. The relationship between the two is one of implication/entailment. Buchanan continues:

> The fundamental point can be put in another way, by making more explicit the connection between equal concern and respect for persons, human rights, and basic human interests. One of the most important ways we show equal concern and respect for persons is by acknowledging that there are human rights. Assertions of human rights signal that certain basic human interests are of such profound moral importance that they merit extraordinarily strong protections. If, for example, there is a human right against religious discrimination, the implication is that the interest in being free to practice one's religion without fear of oppression or penalty is so important that even the good of society as a whole is generally not sufficient reason to justify discrimination. In other words, human rights principles

[206] Ibid, 89.

> specify fundamental moral constraints on actions, policies, and institutional arrangements; they are not merely assertions of desirable or worthy goals.[207]

The need to 'keep the list short' becomes obvious from the understanding of human rights as principles. The right to life, the right to prohibition of torture, the right to prohibition of religious discrimination and the right to means of subsistence can and do function as principles. It is hard to say the same about the right to holiday pay which is not only less important, but also a specific claim right, contrast to a general principle.

Although it is true that human rights are not mere aspirations, it may not be true that human rights *necessarily* impose *fundamental moral constraints* on actions, policies, and institutional arrangements. Buchanan's claim must receive two qualifications. First, as a matter of logic of rights, human rights may be liberty rights (liberties) or claim rights. Indeed, they are interpreted as being claim rights, and in that sense, Buchanan is absolutely correct here. My point is that interpreting all of them as claim rights rather than liberties is an interpretative/political choice, probably a good one, but not a necessary truth. For example, it could be the case the right to religious freedom is interpreted and understood as merely expressing the freedom of people to follow any religion they wish, without that freedom entailing the obligation on behalf of the state to provide conveniences for people to practice their religion. Understanding the right to religion as a liberty means that the right holder merely has permission to hold any religion and that no other person has claim forbidding the right holder from doing so. It does not create any obligations, so it does not necessarily set constraints on actions, policies and institutional arrangements. Indeed, when it comes to whether a right is a claim right or liberty, the correct established terminology – 'right' is a claim right and 'liberty' or 'freedom' is a liberty right – is unhelpful. The International Covenant on Civil and Political Rights refers to 'Rights', but Article 18 refers to 'freedom' of thought, conscience and religion. Yet, in interpreting that 'freedom' as entailing correlative obligations, courts are in effect conceptualising this right as a claim right, not as a liberty right. Either the initial intention was for the right to be a liberty right and it was later, through interpretational choices turned into a claim right, or the initial intention was for the 'freedom' to be understood as a claim right, but the term 'freedom' may have been chosen for non-legally relevant, perhaps symbolic reasons. In any case,

[207] Ibid, 90.

the observation made here is that although the theory is absolutely correct to assume that human rights establish fundamental moral constraints on actions, policies and institutional arrangements, this is because they are interpreted as claim rights, or general principles which include claim rights, and not as liberties, despite the wording of some basic human rights; this interpretation a political choice, not a conceptual or necessary truth. 'Freedom of thought, conscience and religion' can be understood as a liberty right without any change in the words – understanding it as a liberty right would, in fact, be more consistent with the use of chosen terminology.

The second and more important qualification pertains to the Natural Duty of Justice being a *limited* obligation. The Natural Duty of Justice Argument becomes persuasive because it presents itself as claiming that we out to help others join just institutions when there are no costs or sacrifices incurred on us.[208] "In particular, the Natural Duty of Justice is presumably most plausibly construed, as are the duties of beneficence and of rescue, as including an implicit proviso that the cost of acting on it is not 'excessive.' This is not to say that there is no such duty, only that it is a limited duty."[209] Stated like this, the argument bears an intuitive force, just like the mentioned duties of beneficence and rescue. One only need to consider Peter Singer's 'girl drowning in the pool' example: I have the moral obligation to help a little girl drowning in the pool, *if* doing so occurs minimal costs to me, such as merely getting my clothes wet. The argument has strong moral force because the exception ('if…') is built from the beginning so the moral obligation is presented as conclusory.

This is a crucial point of the theory: if one understands moral obligations as conclusory,[210] then the Natural Duty of Justice Argument, on which this standard of legitimacy, this entire theory, rests, becomes problematic. A conclusory moral obligation of Natural duty of Justice would imply that since exceptions have not been built in from the beginning, in all possible instances, we have the moral obligation to ensure others have access to justice, even though such course of action would negate the satisfaction of a morally more compelling obligation. The 'others' renders the Natural

[208] Ibid, 89: 'But the Natural Duty does not generally require sacrifices.'
[209] Ibid, 92.
[210] As, e.g. Applbaum, Arthur Isak Applbaum, *Legitimacy: The Right to Govern in a Wanton World* (forthcoming, March 2018 draft on file with author), 55: 'duties are conclusory… We may be misled by a false temporal story we tell, under which unforeseen circumstances come up to override. But the correct way to think about these circumstances is that they are exceptions built in from the start.'

Duty of Justice Argument impossible or contradictory: when ensuring that A has access to just institutions negates ensuring B, someone closer and dearer to me, has access to just institutions, then it is impossible to perform this moral obligation. According to the Natural Duty of Justice, I have moral obligation towards A and B, yet courses of action satisfying these two obligations are mutually exclusive. This is solved only by exceptions: 'we have moral obligations to help ensure individuals have access to just institutions, unless acting so entails injustice to other individuals, and so on and so forth.' In such instances of prima facie conflict, the one reason for action would prevail over the other, manifesting that 'limited' moral obligations means presumptive; consequently, the so called 'obligation' is reducible to reason for action. Since the Natural Duty of Justice Argument requires that it reaches not only a moral value but a moral obligation, it requires that the moral obligations are limited.

Indeed, on a first glance, it makes sense to see moral obligations as limited obligations. Suppose I agree with you to meet at the pub at seven, I need half an hour to get there and leave forty minutes before in order to make sure I am on time. (Assume that promises create obligations). Suppose that while I am on my way to meet you and being ahead of time, I see a helpless heavily wounded biker at the side of the street with no people around, and it is the case that I am his only chance of survival. As a matter of fact, I either save his life and show up at the pub late, or I let him die and show up at the pub on time. I feel obligated to be at the pub at seven, but I feel more obligated[211] to save a human life even if that means failing on my obligation to be on time at my appointment. I attend the biker and consequently arrive at my appointment late. The immediate response of a lay person would be that the morally compelling obligation to save the life of the biker overrides the moral obligation I have to be at the pub on time. This assumes that the obligation to fulfil my promise is a limited moral obligation: I have the moral obligation to be at the pub at seven, unless I need to save someone's life on the way. A paraphrase would be that the moral obligation to be at the pub on time is a presumptive obligation: the moral obligation to save the life of the biker overrides the moral obligation to be at the pub on time. This entails that being at the pub on time is reducible to reasons for action: I have a reason to be at the pub on time, but a stronger

[211] Technically speaking, there is no such thing as being more or less obligated, since obligations are conclusory. However, here I am not referring to obligations, but in *feeling* obligated (which pertains to reasons for action, which have the dimension of weight).

reason to save a human right, so my moral obligation is to save a human life. Moral obligations are requirements, and as such they do not have a dimension of weight as reasons do. It is not the case that I am a little obligated to arrive at the pub on time and more obligated to save a human life. Saving a human life is the obligation and that renders my reason to arrive at the pub on time as not morally obligatory. Arriving at the pub on time would have been morally obligatory, if it wasn't for this exception.

One could attack the equation of moral reasons being limited with moral reasons being presumptive. The latter, the counter argument would go, requires that moral obligations have the dimension of weight as illustrated in the previous paragraph, the former does not. A moral obligation is conclusory in the sense that it is not presumptive, it does not have the dimension of weight, yet it is limited because there are exceptions. However, this results to the same thing: if all the possible exceptions are built in, then we have a moral obligation (conclusory, not limited/presumptive). In the absence of exceptions (because they are unknown; no known exhaustive list), what is stated is not a moral obligation, but a principle: I have the moral obligation to be at the pub at 7 unless a biker needs my help to survive, unless I am physically unable to make it (ought implies can), unless my sister calls me informing me my parents are in the emergency room of the hospital, etc. entails that these moral obligations (presented here as exceptions), negate, in these instances, the 'moral obligation' to be at the pub. Since the circumstances in which I actually do have the moral obligation to be at the pub are indeterminate, being at the pub because of my promise is revealed as being a reason for action rather than an obligation. I cannot have mutually exclusive moral obligations. If one moral obligation is stronger than the other (note how 'limited' overlaps with 'presumptive'), then the one moral obligation is more 'moral' than the other. This negates the meaning of being obligated, which is that no matter what, I just have to do something, or else I am breaching a moral duty, I am committing a moral wrong. No matter how detestable an action is, it is morally permissible if all the other options are worse. Ascribing the dimension of weight to moral obligations and assuming that a detestable action done because the other courses of action are worse is still somewhat wrong, leads to the paradox of violating the 'ought implies can' rule. No one can be blamed for any action or omission, no matter how appalling, if it was the best choice under the circumstances. Taking a life away may be regarded not only as morally permissible, but also honourable, if the only other option was taking more lives away.

One cannot possibly be morally wrong and morally not wrong. Moral obligations are requirements, and thus conclusory, not limited/presumptive. Or else, we might as well do away with moral obligations and remain with reasons for and against.

Indeed, if we understand limited moral obligations as being moral obligations 'unless' an infinite number of exceptions are substantiated, then the limited moral obligation does not mean much. That's because it will fall under the long list of general standards of behaviour: I have a limited moral obligation to help the elderly, I have a limited moral obligation to treat animals well, I have a limited moral obligation to protect the environment, etc. All these are not moral obligations, but general moral *principles*. It is only in the light of specific circumstances, when there are no exceptions, that we see what our (conclusory) moral obligations are. I have the moral obligation to help an old man cross the street; I do not have a moral obligation to help a man cross the street when others are in better position to do so and I am in a hurry to arrive at the emergency room of the hospital to see my injured wife. I have the moral obligation to not engage in forms of fishing which deplete the oceans from marine life; local fishermen whose only means of survival is engaging in this kind of fishing do not have the moral obligation to abstain from it. Helping the elderly, protecting the environment, helping others have access to just institutions are reasons for action which must be considered in relevant deliberations for action on the balancing of reasons to conclude what the moral obligation is in each instance; the reasons are not moral obligations per se.

Note that if the obligation is limited, it seems unclear how exactly this moral obligation is to play the role of the standard of legitimacy. The more exceptions are built in, the narrower the scope. The standard of legitimacy has substantial meaning, when the necessary and sufficient conditions for its application are determined. If not, we do not know when it applies, and there will be fundamental disagreements about its application in the light of circumstances. The standard will be unable to solve these disagreements because it does not determine the conditions of its application, rendering the standard, the concept, essentially contested. Suppose we maintain the standard of public international law is peace and that is a limited moral obligation. Some states resort to war in self-defence assuming self-defence is one of the limitations/exceptions of this limited moral obligation. Other states resort to war in order to gain access to the sea because that is vital for their interests, assuming this is also a limitation of the standard.

And so on and so forth. The standard of legitimacy does not determine the limitations; it does not determine the necessary and sufficient conditions of its application. Thus, 'peace' here, as a standard of legitimacy, becomes essentially contested, because the concept itself does not allow for an argument to determine whether certain exceptions are permitted or not. One conception of 'peace' as a standard of legitimacy in this hypothetical example is refraining from war apart from instances of self-defence, whereas another conception would be refraining from war apart from instances of self-defence and need to satisfy vital interests by access to sea. As such, it cannot function as a standard of legitimacy, but only as a goal and general principle. Peace can be regarded as a standard of legitimacy of international law under the UN regime, because the limitations/exceptions are defined by public international law itself: self-defence (custom and UN Charter), use of force under authorization from the UNSC (Chapter VII of the UN Charter) and humanitarian intervention (custom – aims at protecting only citizens of the intervening state). It seems that just like the Natural Justice Argument is best understood as a general principle rather than a moral obligation, human rights are best understood as general principles rather than standard of legitimacy, unless their conditions of application are specified. This is why they are best used, in the context of standard of legitimacy, as specific claim rights prohibiting extremes (e.g. prohibition of genocide and ethnic cleanings) rather than a long list of vague moral principles.

What is at stake, one could ask, when wondering whether moral obligations are conclusory or not? What is at stake, to be clear, is the idea of moral obligations as moral requirements. I cannot be presumptively morally obligated. I am either morally obligated or not. What is also at stake is the relevance of obligation to our moral thinking. To be relevant to our moral reasoning, obligations must be requirements. Otherwise, we would do better to forget about obligations and think only about reasons pro and con.

All obligations and rights are conditional. What we are permitted to do, whether this pertains to keeping a promise, or to freedom of speech or to helping others access just institutions depends on the conditions. Strictly speaking, there is no such thing as a 'tiny

bit of violation' of a right. Either what we are doing is permissible, or it is not.[212] This is how the human rights narrative causes confusion. Human rights, being essentially principles, which include several other (claim) rights and liberties, are, both morally and legally, susceptible to restrictions typically either from other human rights or from public interest. Therefore, presenting access to human rights as moral obligation is problematic because it is bound to be the case that we will be morally obligated to help individuals access certain claim rights of some rights-principles, and by doing so deprive other individuals from other claim rights of the same or different right-principles.

Since the conditions themselves can be translated into human rights language, 'human rights' as a standard of legitimacy may be rendered an essentially contested concept. Suppose that in order to help certain individuals enjoy freedom of speech, I support the government in power. Suppose that a condition of this is that the freedom of religion of certain religious individuals is not violated. Suppose that in order to protect their freedom of religion which is violated by freedom of expression supported by the secular government, I have to support certain anti-government groups. At this level of abstraction at least, the 'limited moral obligation' seems to be translatable into human rights narrative, as much as its condition of application (exception). Therefore, under the abstraction of justice as protecting human rights (principles which are entirely unclear as to the full extent of implied obligations), different conceptions of 'justice as protecting human rights' can be conceived. It is legitimate to support the government to help individuals enjoy freedom of speech whereas a different conception of 'justice as protecting human rights' would entail opposing the government so that other individuals enjoy freedom of religion. The lack of specificity of human rights (i.e. which specific obligations are correlative to each human right) is not just a problem; it renders the so-called standard of legitimacy as a mere abstraction, perhaps a goal to pursue, but a non-standard.

To be clear, it is possible to derive moral obligations from general principles and we can know in advance what they are. For example, we can know in advance that we may not

[212] Of course, the badness of the consequences of doing some morally prohibited act will vary depending on the situation. In some cases, it will involve little more than disappointing someone. In other cases, it will involve mass murder.

intentionally kill someone (outside of war, in civil society) 'unless…' and list the conditions under which this is permissible. Furthermore, we can derive this from general moral principles such as 'act only in accordance with principles that no one affected by your action can reasonably reject.' Assuming, for example, that others whom one might kill could reasonably reject any principle allowing you to intentionally kill them unless they are threatening you or someone in your care, this principle about killing can be 'derived' (loosely speaking) from this core general principle. Granted, this example may suffer from oversimplification. Perhaps we need to add further situations that justify killing; for example, that it is in the person's best interest to be killed and they have given their consent. However, we can also derive this more complicated principle from the general principle, and we can know it in advance.

It would be impossible, however, for the theory to derive moral obligations from general human rights principles alone. First, the complexity of certain rights principles is not parallel to the aforementioned example. The most important reason, however, why the theory cannot provide an exhaustive list of obligations deriving from human rights principles, is that it is the courts, not philosophers, who have the authority to interpret basic human rights and thus determine what obligations are and are not implied by each right.

All obligations, to be clear, consist of principles that have a conditional form. 'Do not do A, unless x,y,z. Do A unless x,y,z.' The obligations always apply in the relevant circumstances. Detached from circumstances, it is possible to discuss principles, not obligations per se. Consider the rescue principle: do what you can to save others unless trying to save them imposes a substantial risk or burden on you. Whenever some needs saving, and I can save them, and saving them does not impose a substantial risk or burden, then I have an obligation to save them. General principles like this are abstract. But we can know that they are valid 'ahead of time' and the fact that they are abstract does not prevent us from applying them in real circumstances, so they are action guiding.

It could be argued that my disagreement with the theory is merely a linguistic one. Indeed, the terms 'rights' and 'obligations' can be used differently. 'Rights' can be a synonym for important interests and 'obligation' as a synonym for a good reason to do

something. So understood, rights can conflict. So can obligations. When lawyers talk about rights conflicting, they are talking about interests conflicting. When they talk about obligations conflicting, they are saying that there are reasons for acting pro and con. When the law refers to 'right to privacy,' or 'freedom of expression,' it is referring to principles/interests. When a court decision is referring to 'the right of compensation of A against B' or 'the right of a group of people to perform a march through village B,' the text is referring to rights, not principles/interests.

However, my disagreement with the theory is not merely of linguistic nature. This is because the theory itself acknowledges the distinction between interests and rights: 'Assertions of human rights signal that certain basic human interests are of such profound moral importance that they merit extraordinarily strong protections.' (See above). Whether the theory captures the importance of this distinction is of course another story.

At this point, two observations need to be made. First, being not concerned and being unjust are two different things. As we saw above, the Natural Justice Argument makes its case by assuming that "If I refuse to make such efforts (something minimal as supporting a police and court system) to prevent you from having your most basic human rights violated, can I reasonably expect you or anyone else to believe me when I say that I respect all persons and am concerned about their well-being?"[213] In the absence of other reasons, being not concerned about the suffering of a fellow human being renders one detestable, yet not unjust, as there is no violation of rights per se. It is thus in relation to 'respect' that obligations are established. Respecting human beings, according to the theory, consists in our limited moral obligation to help others access institutions which protect their human rights. Note that it is the institutions which clearly have the obligation to protect human rights. The theory extends such an obligation to all of us.

Second, the obligation is conditioned with the 'no costs' requirement. Or so it states. It could be argued that 'limited' obligation refers not to the presumptive vs conclusory obligation issue but to the costs incurred on us in relation to performing the moral

[213] Buchanan, (n 160), 89 (see above).

obligation of the Natural Duty of Justice. I have the obligation to support someone access just institutions when this amounts to limited costs to myself, but not when it amounts to excessive costs to myself, e.g. losing my job to dedicate my life on helping people access just institutions. However, the 'costs' understanding of 'limited' in 'limited obligation' seems to amount to the obligation being presumptive: I have the obligation to help individual A access just institutions, unless this may cost me rescuing my own son or my job. Rescuing my son is a morally relevant reason for action and in the absence of more morally compelling considerations, such as in this case, a moral obligation. So, the moral obligation to save my son wins over the presumptive obligation to help A access just institutions. It can also be stipulated as follows: losing my son comes at an excessive cost (in a moral conception of 'cost') so then I have no obligation to help A access just institutions. Keeping my job is not a morally relevant reason, but a prudential reason (reason of self-interest) which in this case is conclusive and trumps over the less weighty consideration of helping people access just institutions. In other words, losing my job (in a non-moral conception of 'costs') is excessive cost to bear, so I do not have the obligation to help A access just institutions. In line with conventional and intuitive understanding of morality, the theory accepts that people are not morally required to be heroes and sustain heavy costs/sacrifices to help others, apart perhaps on certain exceptional cases, e.g. if we have certain obligations to certain individuals which require access to justice. "Of course it is another matter as to whether or under what conditions I ought to undergo sacrifices to help ensure that other persons' basic human rights are protected. But the Natural Duty does not generally require sacrifices."[214]

3. Costs

Having used the 'no costs on us' component for the argument to gain intuitive force, the theory moves on to argue that we have moral obligation to even bear *significant* costs to help others join unjust institutions.

> But surely if these interests are so extraordinarily important that the corresponding rights should not be violated even when violating them would promote overall social utility, then recognizing their importance

[214] Ibid, 89.

> requires not only refraining from violating the corresponding rights, but also being willing to bear some significant costs to ensure that these rights are not violated by others. How could it be the case that a particular interest is of such profound moral importance that we should not violate the corresponding right even to achieve a significant benefit for many people and yet also be true that we have no significant obligation to help ensure that all persons have access to institutions that protect this interest? A regard for the moral equality of persons sufficiently robust to ground the assertion that there are human rights also implies that we ought to bear significant costs to ensure that all persons' rights are protected.[215]

This is not a big step from theory's previous claim. If one maintains that there is such a thing as limited moral obligation, the amount of sacrifices that each one of us is morally obligated to sustain in order to perform that duty depends on the specific circumstances of the individual case when we are called on that duty. The amount of sacrifice is not determined a priori, so it is not part of the argument. The argument is neutral towards the specifics. This is exactly where the view of moral obligations being conclusory finds ground to argue that without such context, it is indeterminate what our moral obligations are which depend on the balancing of all the relevant considerations. The amount of sacrifice is one among the several considerations in the balancing of reasons, both moral and non-moral, which is required to determine whether there is, in a given case, a moral obligation.

Therefore, like the duty of benevolence, the natural duty of justice does not establish a moral obligation. Just like the duty of benevolence, it is a moral principle, 'Do good to others if there is no substantial cost to yourself' and thus a reason for action which is balanced with other reasons in guiding our behaviour, but it is not, out of context, a moral obligation, certainly not without the 'unless' possibilities of individual circumstances. Moral obligations are conclusory - exceptions are built in from the beginning.

Note that if the natural justice argument is a limited duty, then it does not carry with it the force it claims to have. Since it is not a genuine obligation but essentially a reason for action, it is weighed and balanced with other reasons and values in deciding what to do. Buchanan turns values into moral reasons. With this move, a number of other values can be turned to reasons for action. For example, is the protection of the environment

[215] Ibid, 90.

not essential for the survival of the human species? Is it not necessary to protect it for the sake of the current and future generations? Does this environment not enhance living standards of human beings? Is this not a value we ought to pursue? If the answer to all these questions is positive, then there is a reason for everyone to not only avoid protecting the environment, but with the same rational as the so-called natural duty of justice argument, assume that there is an obligation to positively act in order to help so that everyone lives in a safer and cleaner environment. Suppose it is the case that an action with negligent costs to us hugely benefits the environment and the rights of others. Suppose this action prevents us from performing a different action with more costs/higher sacrifice to us which potentially contributes to a few more people accessing institutions which help justice. Which action is morally obligatory?

Two issues are to be noted. Suppose the former action only indirectly helps the living standards of many fellow human beings, whereas the latter directly helps much fewer people achieve justice. First, notice how easily we create obligations with this rationale. Second, if everything is translated into human rights, then it seems that human rights is not a moral value or moral reason, but an abstraction. This is a main problem to which, having reflected on the natural Justice Argument, we shall now turn.

4.2.3.3. Identifying the crucial problems

1. Abstraction (lack of specificity) of human rights

The fundamental problem with the theory is that it underestimates the effect of the level of abstraction of human rights. Indeed, the theory contests to the fact that lack of specificity of human rights is an issue. It accurately calls it 'Deep indeterminacy'.[216] For example, there is consensus 'as to the nature of the interests that the right against religious discrimination accords extraordinary protection to,' but there is no consensus 'as to whether freedom of religious discrimination requires outlawing a state religion of the relatively benign form found, say, in Norway, or the prohibition of 'Christian Businessmen's' organizations that give their members special opportunities for advantageous networking in the United States. We may all agree that no one should be

[216] The following is reproduced from ibid, 182.

penalized for his religious affiliation, but on closer inspection we may disagree as to what counts as a penalty (as opposed to a mere lack of benefit).'

Indeterminacy also causes two cost problems.[217] The first pertains to assigning priorities between different rights, given that resources are limited. For example, suppose that although the incidence and severity of torture are declining, further progress will be extremely difficult and very costly, whereas right to healthcare and right to freedom of expression have not shown such progress; "you have no rational principled way of deciding just when the marginal costs of continuing efforts against torture are too high, given that every additional dollar spent in the antitorture campaign could be spent in support of other human rights. You cannot locate such a unique rational trade-off point because you have no rational way of commensurating the evil of *n* cases of torture with *n* + *m* cases of interference with freedom of religion, etc."

Indeed, different emphasis on different interests would lead to different conceptions of human rights as a standard of legitimacy. Human rights protect values, and as long as there is plurality of values, tension between them will reveal different conceptions of protection. In the absence of an argument settling the dispute of whether more resources should be allocated to reduction of torture or increase of healthcare and freedom of expression, the human rights standard itself is rendered essentially contested.

The second cost problem "would persist even if there were only one human right to be supported" as it concerns excessive demands.[218] The theory correctly recognizes that both individual rights and rights of distributive justice are understood as implying not only negative but also positive obligations.[219] "And the question will always remain: What costs are we obligated to bear to reduce violations of these rights?"[220] This is where the language of obligations vs language of rights and perhaps a restrain on judicial activism (so that additional obligations are added through treaties, rather than courts themselves deciding at each point in time what obligations, not existing in the letter of the law, are implied in a right, thus essentially legislating), can be useful. If one

[217] The following is adapted from Ibid, 182-183.
[218] Ibid, 183.
[219] Ibid, 184.
[220] Ibid.

insists in the human rights narrative, however, then as the theory admits, "moral theory seems to yield no uniquely correct answer."[221]

2. Lingering from abstraction to legality

The theory admits that the problem of deep indeterminacy is 'not even soluble in principle' but it can be ameliorated by proceduralist justice: democracy. If specifications of human rights are determined in a democratic order, the results are likely better. The stress here is on 'likely'. Democracy does not guarantee good result; it guarantees participation. This is less nowadays than in Hellenic antiquity, where with direct democracy, voters exercised all three functions and literally ruled. Direct democracy has been substituted by indirect democracy, where voters choose, once every four years, their rulers. The theory is realistic, there is indeed no solution, only amelioration.

The theory does not recognize, however, that this amelioration may be rendering human rights as a non-standard of legitimacy. First, from a purely empirical/descriptive standpoint, the procedural justice of democracy has led to gross violations of human rights. Adolph Hitler was democratically elected and his use of Article 48 of constitution of the Weimar Republic of Germany that allowed the President, under certain circumstances, to take emergency measures without the prior consent of the Reichstag, was as legal as the use of the same Article by previous presidents. It was also legitimate, if legitimacy is understood in a procedural conception, assuming the Nazi regime followed the established procedures. The courts interpreted the law, including human rights, in accordance with the positive law at the time, as established by the relevant procedures. Most German lawyers under the Weimar republic remained in office when the Nazis took over and remained in place after 1945 when the German Federal Republic was created. Similarly, judges in Nazi courts engaged in standard legal methodology and rules. As Professor Friedrich Roetter stated in 1945 "the acts of the Nazi regime were committed under law. The Nazis recognised the necessity of law."[222] Even though the goals of certain courts were to eliminate the Jews, the legal rules and methodology were consistent with widely accepted practices of law. When

[221] Ibid, 184.
[222] Friedrich Roetter, 'The Impact of Nazi Law', Wisconsin Law Review (1945), 516.

judges had to decide whether or not an individual was a Jew by law, they applied the same interpretive techniques that are accepted worldwide. The Nazi regime was illegitimate on substantive grounds, of course, mainly extermination of Jews, homosexuals and gypsies, but it is exactly the substance which procedural justice leaves out. Similar violations of human rights took place in the soviet revolution against the tsar or Russia and the communist revolution in China after WWII. Revolutions overthrew the existing legal order and did not follow democratic procedures, yet they resulted to the same violations of human rights that procedural democratic justice did. The conclusion is obvious. Procedural justice does not determine good results. Second, regardless of empirical reality, conceptually speaking, procedure does not guarantee good substance. Human rights have content when specified. The content is not determined by the theory, but by a different criterion, which is procedural, not substantive. By surrendering the essence of the theory, i.e. the content of the human rights which are the standard of legitimacy, to procedure, the theory is essentially transformed from substantive to procedural, without much content. As stated in Chapter 2 of this discussion, although there is conceptual room for a procedural conception of legitimacy, legitimacy is best understood as substantive, if it is to avoid being consumed by legality. The procedural criterion guarantees legality since procedure is established by law (in the context of the theory, constitutions establish democracy and relevant procedures). The procedural criterion is unable to guarantee good substance, acceptable content, (substantively) legitimate result. Therefore, legitimacy in a procedural conception can lead to illegitimacy in a substantive conception.

If protecting human rights is about protecting the relevant interests/values (the well-being of individuals etc), the focus must be on substance, not procedure. Interests/values are substance, not procedure. By surrendering specification of human rights to procedure, we shift the focus from interests/values/substance, to human rights language/narrative, which, itself, can lead to the most gross violations of what it deems to protect. There is no way out: the deep indeterminacy is insoluble. The democratic justice procedure is the only way of specification. Thus, the theory seems to oscillate from a procedural conception of legitimacy (essentially legality) which is thus unable to guarantee a substantively legitimate outcome, to a non-standard, which is what we are left for, if human rights are not specified: an abstraction.

Therefore, although the theory does identify specification of human rights as its weakness, it does not seem to realize that this is detrimental to the theory itself, i.e. it is crucial for human rights to function as standard of legitimacy. In understanding rights as entailing certain obligations, the theory assumes that human rights are claim rights and that claim rights include liberties and correlative obligations[223], that obligations are especially weighty,[224] and that especially weighty obligations owed to persons manifest protection of interests.[225] Although rights do indeed protect interests, the other claims are not entirely true as they may seem to be in first glance. I will analyse these claims one by one, starting from the last one.

3. Rights, liberties, interests and obligations

It is important to distinguish interests that rights protect, from the rights themselves. In the case of basic human rights, the interests are weighty. Indeed, these human rights being basic, fundamental, do not protect just any interests, but presumably only important interests. How are interests protected? The common answer is: rights. The interesting observation is that since rights ground duties, the answer could also be duties. It is important to observe that choosing to stipulate protections of interests in terms of rights instead of obligations is a choice of narrative. The interest of every human being to not be tortured can be protected by a power stipulated in a language of rights (People have the right to not be tortured / No one shall be subjected to torture) or by a power stipulated in a language of obligations (The government is obligated to not torture and protect people within its jurisdiction from torture). Indeed, this is exactly what differentiates rights from liberties: rights are claims, and thus correlative to duties.

The theory is not entirely correct on the issue of human rights being claim rights and liberties. The theory makes two distinct claims: first, human rights are claim rights and second claim rights consist of liberties plus correlative obligations. The problem begins with the second claim, which is false. It is simply not true that claim right equals to liberty + correlative obligation. By contrast, it is clear from the Hohfeldian scheme that the following three premises are true. First, a right is *either* a claim right *or* a liberty.

[223] Allen Buchanan, (n 160), 123.
[224] Ibid, 124-125.
[225] Ibid.

Second, one cannot derive a liberty from a claim right or vice versa. Third, the correlative to a (claim) right is a duty whereas the correlative to a liberty is a no-right. For example, my (claim) right to compensation against A consists on the obligation of A to give me compensation. My liberty to pick up a pebble at the beach consists on the absence of anyone's (claim) right to that pebble; if anyone had (claim) right to that pebble, I would have the obligation to not take it, so I would not have the liberty to take it.

Furthermore, the theory seems to falsely assume that obligations are somehow consequences of the (claim) rights so it can be decided later what these obligations are. Although obligations per se may be unspecified, it is specified what obligation is entailed. For example, if you damage my car, my right to compensation per se does not specify the exact amount of money you owe me, but it does specify that you have the obligation to pay me compensation. The right to due process implies the obligation of no arbitrary treatment, even though what constitutes arbitrariness is unspecified. Duties/obligations are the other side of the coin of the right. That is to say, it is *not* the case that a right somehow *causes* an obligation, there is no 'distance' between the one and the other, nor is it the case that a right 'includes' an obligation. By contrast, to say that the obligation/duty is correlative to the (claim) right is to say that the one constitutes the other. A having a right against B *is* B having a correlative obligation to A and vice versa. Buchanan's theory does not seem to understand what 'correlative' means. It regards rights as boxes/claim rights which include several 'essential elements' inside them, namely liberties and obligations, so it remains to be seen what exact obligations are entailed. The theory thus ignores the issue of what constitutes a right, i.e. a correlative obligation, by misconceiving claim rights as including both obligations and liberties.

The theory thus assumes human rights to be both claim rights and general standards of behaviour (interests) at the same time. To the detriment of the theory, this a key-issue. If we fail to identify which obligation is correlative to each right, then we fail to explain how it is that human rights are rights. The issue becomes more complicated with social rights. Rights and standards of behaviour are two different things. B owing compensation to A means that A has the (claim) right of compensation against B. This is much more specific than a standard of behaviour. A standard of behaviour is latched

on the interest, which is distinct from the right itself. For example, there is an interest in human beings to not be tortured. We can stipulate that in a general principle against torture. From this principle, one can derive a (claim) right of individuals that their governments protect them from torture. Notice that the language of obligations can be more helpful because the stipulation begins with the subject of the obligation: governments have the obligation to protect people in their jurisdiction from torture.

Whether a stipulation is a principle/interest, or a right may not always be clear and may be a matter of interpretation. Certain human rights, such as the right to be treated with 'humanity' and 'dignity' when deprived of liberty [226] are more obviously standards/principles that include several other rights within them, perhaps both claim rights and liberty rights, maybe even immunities as well. For example, from the general principle/interest to be treated with humanity and dignity, the following rights/obligations can be derived: the right of individuals (and correlative obligation of the government) to not be inappropriately touched during body search, the right to not be disrespected because of sex, gender, racial, ethnic or religious identity, etc. By contrast, other human rights are not principles/interests but indeed (claim) rights, such as the right to seek pardon.[227]

A hypothetical example with a dose of oversimplification for the sake of the argument can illustrate the difference between interests and rights. As a human being, I have an interest in freedom of expression. I am indeed better off, as a human being, in expressing myself freely than not expressing myself. Suppose that in western societies, my freedom of expression is restricted because certain people in power decided that several words ought to be used and other words ought not to be used because certain other people may feel uncomfortable, and the number of groups in society regarded as sensitive is increasing, with corresponding restriction of freedom of expression. Suppose that by contrast, in Thailand, which at the moment of writing a military junta is in place, the only restriction of freedom of expression is prohibition of saying anything bad about the king and in overall, individuals enjoy more freedom of expression in

[226] Article 10 par. 1 of the ICCPR 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'
[227] Article 6 par. 4 of the ICCPR 'Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.'

Thailand than in western societies. In terms of interests, the interest of freedom of expression is greater, or better served, or more satisfied, in Thailand, in this example, than in western societies. In terms of rights and duties, the comparison is different: in western societies I have the obligation to not say so many things, whereas in Thailand I have the merely obligation to not say anything bad about the king – in both western societies and Thailand, I have the right to express myself with any way that is not prohibited.

The distinction between rights and interests is extremely important because it helps dissolve three interrelated myths, namely that 'the more rights the better', that human rights are by default the correct narrative, and that human rights have improved living standards. There seems to be a shared understanding, at least in the western world, that human rights are something good, valuable, desirable. China has obviously a different understanding on the issue since it stresses social rights rather than certain individual rights, such as the freedom of expression. However, let's grant Buchanan the benefit of the doubt at this point and accept that the shared understanding underlying human rights has grown. The belief created is that since human rights are something good, 'the more the better.' There is a pressure that legal orders protect more human rights to a greater extent. First of all, this is entirely illogical in and of itself, for the simple reason that expanding one right often entails restricting other rights. Expanding the right of religious freedom, restricts right of freedom of expression and vice versa. If the right of freedom of expression extends to creating comics making fun of religious symbols, the right to religion is restricted to the extent that believers of that religion have to tolerate such a disrespectful act. If, on the other hand, the right to religion is expanded as including the claim right against religious symbols being offended by comics, then freedom of expression is restricted to the extent that individuals are not allowed to express their personality by drawing certain kinds of comics. Besides, Alexy's work *A Theory of Constitutional Rights* famously argues that constitutional rights are principles and that principles are 'optimisation requirements'.[228]

Second, one must separate the human rights narrative from human rights themselves. Human rights narrative is a language we use, a rhetoric. But it is not the rhetoric per se

[228] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010).

which satisfies interests. Suppose I give food to a poor child in an undeveloped country. Many would say that I have supported the child's right to food. It seems to me that human rights language is not the best tool to describe the situation. What is true is that I have satisfied, to a certain extent, the interest the child has toward being fed. However, it is not at all obvious to me that I have supported the child's *right* to food, simply because the right of the child to food is not targeted toward me. A right, literally speaking, is a claim right, not an interest. The correlative of a claim right is obligation. The child's right to food may entail obligation to feed the child on behalf of his/her parents and probably the government, perhaps also of other bodies which assume the obligation to feed children in the area. The right does not entail any obligation to me. Therefore, by giving food what I am satisfying is the child's 'right' to food in the sense of the child's *interest* to food, not the child's claim right to food. A sense in which I am supporting the child's 'right' to food is reducible to satisfying the child's interest in being fed.

This distinction helps dissolve the third myth, which is that human rights have improved the human condition, the living standards around the world. Living standards, human conditions are an interest. How humanity goes about protecting that interest and what language is used is a different point. It is a mistake to think that world poverty has been reduced *because* of human rights. The truth is that world poverty has been reduced, though sadly not yet entirely eradicated, not because certain rights have always existed or at some point in time have been granted to all human beings, but mostly due to technology. For example, in Egypt, Sudan, and Ethiopia, local extension services are delivering real-time weather data to vegetable farmers via SMS, and in West Africa, private companies such as Ignitia are expanding the accuracy and precision of SMS weather alerts to remote farmers.[229] Entities such as these private companies which help farmers avoid destruction of their produce do not think in terms of human rights but in terms of interests: both the farmers and people who need food are better off if farmers' produce is not destroyed, because the more food in the specific market, the lower the prices will be and thus it will be more accessible to the people in need. What helped women gain control over their bodily functions is not any right, but technology of

[229] Leah Samberg, 'How new technology could help to strengthen global food security', World Economic Forum https://www.weforum.org/agenda/2018/03/food-security-s-social-network accessed on the 24th March 2019 at 16:20.

contraception. Note how this discussion is meaningful without any use of the human rights narrative. This discussion takes place in terms of interests and means which satisfy these interests. This is a discussion of descriptive claims, not rights.

The distinction between rights and interests helps conclude the main point. This distinction manifests a crucial reason why human rights work as standard of legitimacy only when stipulated in terms of values/interests, disentangled from human rights narrative. The latter increases the abstraction of human rights rendering them as a non-standard. Human rights then conflict with public interest, which is also worthy of protecting, and with each other. On the other hand, their lack of specificity when stipulated as interests/general principles/standards of behaviour instead of specific claim rights or liberties, makes it unclear to determine which claim rights and liberties are covered by each principle, which is ultimately determined by judicial interpretation. The problem is even greater with social rights, such as the right to resources for subsistence, as they consist merely on positive obligations, so the certainty of that negative obligation of non-interference implied in individual rights is non-existent. The problem then with human rights as standard of legitimacy is that the human rights narrative renders them as an abstraction with no specified obligations, whereas human rights as interests/values renders the standard as an essentially contested concept, because the values are incommensurable and there is no argument to determine which value has priority when they conflict. Human rights are indeed a primary goal international law ought to pursue, but not necessarily a standard of legitimacy. The way human rights can be incorporated in a substantive normative standard of legitimacy is either by establishing one value, or by establishing more than one values in hierarchical structure, and/or by setting specific obligations (language of obligations rather than language of rights?) in regard to extremes, such as obligation of states and global institutions to prevent genocide and ethnic cleansing, obligation of states to provide means of subsistence, obligation of states to refrain from arbitrary persecution, obligation of global law making institutions to punish states which commit certain wrongful acts etc. Having made the point regarding the essential contestability of human rights as standard of legitimacy and identified the crucial problems of the theory which lie at its core, I will now present the rest of the theory.

4.2.3.4. Recognitional (or international) legitimacy

Based on the account of justice in the sense of protecting basic human rights, the theory builds a conception of recognitional (also called international legitimacy).[230] The theory states that:

> The *traditional* criteria for recognitional legitimacy, formalized in the Montevideo Convention of 1933, are purely descriptive: An entity is entitled to recognition as a state if and only if it possesses (1) a permanent population, (2) a defined territory, (3) a functioning government able to control the territory in question, and (4) the capacity to enter into relations with other states on its own account (not merely as an agent of another state).[231]

The theory continues to explain why recognition is desirable.[232] Being recognised as a legitimate state confers unique disadvantages, i.e. doing what states do, such as being party to alliances and treatise with other states, relationships not ordinarily available to nonstate entities. 'If an entity is recognized as a legitimate state, then at the very least other states are prohibited from taking its territory or interfering in its internal affairs and are also prohibited from aiding others in doing so.' Finally, legitimate states are participants in the processes by which international law is made.

The theory then goes on to state its claim in recognitional legitimacy: "The criteria for recognitional legitimacy of states I propose include (1) a minimal internal justice requirement, (2) a nonusurpation requirement, and (3) a minimal external justice requirement."[233] Requirement (1) refers to justice as explained above, i.e. protecting basic human rights, as a standard of legitimacy of states. With this conception of political legitimacy, a wielder of political power is morally justified in wielding political power "if and only if it (1) does a credible job of protecting at least the most basic human rights of all those over whom it wields power and (2) provides this protection through processes, policies, and actions that themselves respect the most basic human rights."[234] Requirement (2) refers to a criterion of statehood which is advanced by some as additional to the ones of the Montevideo Convention, namely that

[230] Allen Buchanan, (n 160), 261-327.
[231] Ibid, 264.
[232] The following is adapted from ibid, 265.
[233] Ibid, 266-267.
[234] Ibid, 247.

in coming into being, an entity that claims to be a state must not have breached a (basic) rule of international law.[235] Requirement (3) extends the human rights conception of legitimacy to cover that the states act in ways that affect others beyond their borders, "relying on the intuitively plausible idea that how they act externally matters as to whether they should be regarded as legitimate states."[236]

The word 'minimal' is not random. "This two-part (internal and external) justice requirement is called minimal to indicate that legitimacy does not require perfect or full justice, but rather a threshold approximation of justice, along with a credible commitment to progress toward greater justice."[237] This is compatible with a claim made previously in this discussion, namely that the theory makes a stronger argument the more loyal it remains to the short list of the specific basic human rights advanced, whereas the more the list expands and rights become broader, the more the theory begins to suffer from internal conflicts, is elevated in the ladder of abstraction and/or rendered as essentially contested. The theory does recognize that "if it is to provide useful guidance for practice," it "should not be so utopian as to be self-defeating."[238] However, by 'self-defeating, the theory does not refer to the crucial problems as explained above in this discussion, but to the fact that if the conception of recognitional legitimacy consisted on justice standards that "were so stringent as to imply that even the most admirable existing states are illegitimate would not likely be taken seriously in the world of action, even as aspiration."[239]

The theory offers two justifications regarding the internal and external justice requirements.[240] The first is nonconsequentialist ('rights-based'). It takes as a premise the obligation not to be an accomplice in serious injustice. Indeed, if international law recognized as legitimate states entities that were *not* internally politically legitimate, i.e. that did not respect the basic human rights of those within their borders, it would thereby confer legitimacy on entities that are not morally justified in wielding political power. 'In other words, recognition *supports* and *enhances* the ability of an entity that is awarded this status to wield political power' within its territory. The same holds true for

[235] Ibid, 264.
[236] Ibid, 267.
[237] Ibid, 268.
[238] Ibid.
[239] Ibid.
[240] The following is adapted from ibid, 270-271.

the external justice requirement. The second argument is teleological. Recognition, as institutional practice, provides incentives for behaviour. If advantages of recognition are awarded only to entities which respect human rights in and out of their territory, there will be incentives to do so.

There are two criticisms for this part of the theory. First, ironically enough, perhaps due to lack of adequate understanding of public international law, the theory ends up conflating legal validity with legitimacy. The criteria of the Montevideo Convention are indeed descriptive. The theory does not seem to fully understand why. The reason is because the creation of a state, is a socio-political process. Therefore, whether an entity is a state or not can only depend on the existence of *descriptive* criteria, facts. The criteria of the Montevideo Convention simply describe what exists. Even if the convention had never existed, it would still be the case that these four descriptive criteria are the necessary and sufficient conditions of statehood, regardless of whether one would have to resort to custom as source of international law rather than treaty in order to identify them. The criteria explain when, as a matter of fact, an entity becomes a state, i.e. obtains legal personality as a subject of international law. Apart from population, territory and government with effective control, the entity, in order to be a state, must have the capacity to enter into relations with other states *as* a state. Then, and only then, an entity becomes a state.

However, an entity becoming a state does not entail that the state is legitimate, especially if it is the case that the conception of legitimacy deployed is the one of human rights. Just like many states may be failing that standard and thus be illegitimate, such as China which violates fundamental human rights, they remain sovereign states, as opposed to de facto regimes, which are non-state entities. As explained in a previous part of the discussion, legal validity and legitimacy are distinct. Therefore, it is wrong to present the criteria of the Montevideo Convention as criteria of international legitimacy; they are criteria of statehood. They are criteria which determine when an entity becomes a state. They pertain to legal validity, not legitimacy.

The theory, and this is the second criticism, conflates the criteria of statehood with conditions of recognition. Requirements for recognition of an entity *as* a state (the criteria for statehood) are prescribed, as explained above, by international law, and are

thus fixed, they do not vary from state to state; by contrast, requirements for recognition *of* a state are preconditions for entering into optional or discretionary relations with a state (the conditions for recognition) and can vary from state to state.[241] The first is a matter of (public international) law. The latter is a matter of morality and politics. Although states often decide whether to recognize a state as such on political reasons - e.g. Turkey does not recognize the Republic of Cyprus, which is a state, as a state, but recognizes the illegal de facto Turkish regime at the illegally occupied part of Cyprus, even though it has been recognized as illegal by international law - we are allowed to believe that morality becomes increasingly relevant, at least in instances where political interests do not stand in the way. The theory correctly maintains that the three additional criteria (internal/external justice and nonusurpation), are criteria which the states ought to consider when deciding whether to recognize an entity as a state, and this is a moral deliberation and decision. In the very words of the theory: "for any state or group of states to determine its relationships with other entities in accordance with the existing criteria for recognition is to take a moral position; to oppose the existing criteria is also to take a moral position."[242] Therefore, the theory does not refer to criteria of statehood like the Montevideo Convention, but to conditions for recognition. It conflates two distinct issues, namely when an entity becomes a state on the one hand, with when states choose to recognize an entity as a state on the other. Since the criteria the theory lays down include the standard of legitimacy, the theory is correct to the extent that it refers to recognition of *legitimate* states. It is not correct to the extent that it treats these criteria as criteria of statehood instead of conditions of recognition. The theory is a good advice for governments, not an amendment of the law.

Buchanan is most certainly not alone in establishing morally relevant conditions of recognition. [243] Examples are plentiful: the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' adopted by the EU Member States' Ministers for Foreign Affairs on the 16th December 1991 make recognition dependent on fulfilment of rule of law, democracy, human rights, guarantee of minority rights, respect for the inviolability of existing boundaries, acceptance of all relevant commitments with regards to disbarment, and recourse to arbitration. The United States

[241] Stefan Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: *Tertium Non Datur*?' (2004) 75 British Yearbook of International Law 101, 108-109.
[242] Allen Buchanan, (n 160), 266.
[243] This is adapted from Talmon, (n 241), 108-109.

had made a similar declaration during the same year and Japan prepared such guidelines for recognition.

Admittedly, criteria of statehood and conditions of recognition are conflated if one blindly follows the constitutive theory of recognition, which is, however, abandoned and for good reasons. According to the constitutive theory, only recognition makes a state a state, and thus subject of international law.[244] As Oppenheim put it: 'A state is, and becomes, an International Person through recognition only and exclusively.' Therefore, recognition is a matter within states' discretion. The constitutive theory is correctly characterized nowadays as an expression of an outdated view of international law as a purely consensual system, where legal relations can only arise with the consent of those concerned. 'From this point of view, fulfilling the conditions for statehood alone does not suffice to render an entity a subject of international law, thus leaving the non-recognized State without rights and obligations *vis-à-vis* the non-recognizing States; in other words, international law does not apply between them.' Indeed, the most compelling argument against the constitutive theory is that it leads to a relativity of the state as subject of international law. This is because what one state may consider to be a state may, for another, be a non-entity under international law. However, states are natural-born, i.e. absolute, subjects of international law and are not relative subjects of international law created by existing states as, for example, international organizations. Indeed, the idea of one state deciding upon another State's personality in international law is at odds with the fundamental principle of the sovereign equality of States. Furthermore, the constitutive theory is incapable of explaining the responsibility of non-recognized states under international law. Not being subjects of international law, they are not only without rights in international law, but are also free from all international legal obligations. How, then, was it possible for the international community to ascribe responsibility to Rhodesia for acts of aggression, or other violations of international law, if it did not exist as a subject of international law? If the non-recognized State can violate international law, it must also (at least partially) be a subject of that law.[245]

[244] The following two paragraphs are adapted from ibid, 102.

[245] Note how Talmon chooses his examples correctly. The illegal de facto Turkish regime occupying 38% of the Republic of Cyprus does not satisfy the fourth Montevideo convention condition and is not a state, and thus does not have international responsibility (only Turkey which *is* a state and invaded Cyprus in 1974 has international responsibility). Rhodesia was not a de facto entity but a state, from 1965 to 1979. Whether it was a *legitimate* state is, of course, a different question.

Finally, Hersch Lauterpracht attempted to soften the negative consequences of the constitutive theory but he was, unsurprisingly, unsuccessful. He assumed that an obligation of recognition arises once the conditions for statehood have been met. However, and here Talmon brings us back to the point made three paragraphs above, "state practice shows that such an obligation does not exist, and that recognition is instead treated as a question of political and economic expediency." It is exactly these political considerations of recognition that Buchanan wants to moralize; he does not seem to realize, however, that an argument on conditions of recognition does not get you to the conditions of statehood. It would be a paradox, rather say an obvious contradiction, if an illegitimate state, due to it having permanent population, defined territory, functioning and effective government and capacity to enter into treaties with other states *as* a state, would find Buchanan's theory insisting that it is not a state because it violates human rights. It would obviously be an *illegitimate* state, just as obviously as it would be a *state*.

Indeed, "The now predominant view in the literature is that recognition merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a state."[246] There may be disagreements between states about whether an entity is a state, typically due to political reasons, but the fact that the issue is contentious is merely the result of the absence of an authority deciding on the question of statehood, its determination being binding for all, which is a problem of international law in general; 'it does not mean that all states' views are equally correct and that consequently, in applying the constitutive theory, the question of statehood is answered by looking to the views of individual States.'[247] Talmon is correct to conclude that 'the international legal personality of a State and its concomitant rights and obligations solely depend on it being able to satisfy the criteria for statehood.'[248] Indeed, the

[246] Talmon, (n 241), 105. See also note 28 substantiating the claim: See, e.g., Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 16; Antonio Cassese, *International Law* (2nd edn, OUP 2005), 73-74; Benedetto Conforti, *Diritto internazionale* (5th edn, 1997), 17; Patrcick Daillier and Alain Pellet, *Droit International Public* (7th edn, 2002), 557-8; Karl Doehring, *Völkerrecht* (2nd edn, 2004), MN, 155; Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law', RdC, 281 (1999) 1-438, 118.
[247] Ibid, 106.
[248] Ibid.

declarative theory is well supported by treaties, declarations of states and especially jurisprudence.[249]

Therefore, Buchanan's theory on international legitimacy needs to be presented differently. This standard of human rights and nonusurpation is normative, not descriptive and it is a conception of legitimacy of (already existing) states, not condition of legality/statehood. It is a set of considerations that states ought to consider when making the political/moral decision to enter into optional or discretionary relations with a state. The theory does not pertain to statehood, but to legitimacy.

To complete this part of the discussion, it ought to be mentioned that the theory makes a claim regarding the legitimacy not of states, but of the international legal system. The theory maintains that like any system for the exercise of political power, the international legal system ought to be democratic, but should not be equated with increasing state majoritarianism in the workings of the system. The most serious 'democratic deficit' is not that states are unequal, but that some people, a technocratic elite, are not democratically accountable to individuals and non-state groups, yet they play an increasingly powerful rile in a system or regional and global governance.

Finally, the theory makes certain suggestions for reform. In particular, the theory applies the conception of legitimacy as justice in the sense of protecting human rights in secession and self-determination and maintains that international law should recognize a remedial right to secede but not a general right to self-determination. Although it is important that these suggestions have been mentioned for purposes of completion of presentation, they will not be discussed because they do not help us see legitimacy as an essentially contested concept.

4.3. *The Heart of Human Rights* and the Metacoordination view

In his latter book, *The Heart of Human Rights,*[250] which will be discussed only briefly here, Buchanan slightly changes his views. The goal of the book is to set a framework

[249] Ibid, 106-107. Also see Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015) Published to Oxford Scholarship Online: August 2015 http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198704041.001.0001/acprof-9780198704041 186: 'In general, the declaratory view is generally more consistent with the practice of states, which have treated many entities meeting the criteria as states without formally recognizing them.'

that justifies the international human rights system. He argues that despite moral criticisms, there are good reasons to support the system on moral grounds and good reasons for all states to participate in it. Buchanan draws a sharp distinction between moral and legal rights and rejects the Mirroring view, i.e. the belief that justifying an international legal human right typically involves defending the claim that a corresponding moral human right exists.[251] Buchanan maintains that like legal rights generally, international legal human rights need not be legal embodiments of corresponding moral rights and they can be justified by appealing to a variety of moral considerations. As mentioned previously in this discussion, Buchanan makes two important claims regarding human rights that make this view differ from the view we discussed: that either it is the case that there are moral economic and social rights, or economic and social rights are only legal, but in the right sort of legal system, they have moral force. In any case, and that is the second claim, states have moral obligation to provide legal positive rights, a category of which is the social and economic rights. Failing to do so counts against their being legitimate.

In this book, Buchanan makes a departure from his view on legitimacy which we examined, since human rights are not the (fixed) normative standard of legitimacy. He presents what he calls the Metacoordination view, i.e. that legitimacy assessments are best construed as the focus of a social practice. The object of this social practice is to achieve consensus on the question of whether we should accord to an institution the sort of standing that is generally required for it to perform its distinctive functions without undue costs. The Metacoordination view is not a normative standard of legitimacy, but a way to find such a standard, it is a heuristic method. This is a different question than the one addressed in this discussion which pertains to normative conception/standard, which is why this view is not explored in this discussion.

However, and this is worth mentioning, the view advanced in this discussion regarding legitimacy as an essentially contested concept seems to be compatible with Buchanan's Metacoordination view. Since institutions vary in nature, the Metacoordination view "casts doubt on the possibility of developing a substantive, action-guiding theory of

[250] Allen Buchanan, *The Heart of Human Rights* (OUP 2013).
[251] Ibid, 17. The mirroring view accepts a few exceptions. A justified legal right does not mirror a moral human right when a legal right is specification to a moral right (e.g. the right to freedom of the press is a specification of the right to freedom of expression) and when the legal right plays an instrumental role for realizing a moral right.

legitimacy that would cover all the different sorts of institutions to which this very general concept can be applied."[252] This claim well fits with the understanding of legitimacy in this discussion, more specifically with the fact that detached from its individual conceptions, legitimacy as a concept has no content other than it being a moral power. Here, Applbaum can complement Buchanan. "This account of the general concept does not itself specify criteria of legitimacy, much less standards of legitimacy. Indeed, it explains why we should reject the assumption that we should expect an analysis of the concept of legitimacy to yield any determinate criterion of legitimacy, much less a single criterion that is applicable to all institutions."[253] Thus, the view is compatible with legitimacy being an essentially contested concept: in the absence of fixed/determined criteria of legitimacy, it is possible, not only that different institutions will have different standards of legitimacy, but also that there may be equally well argued and evidenced standards/conceptions of legitimacy for the same institution. Although the former is most certainly much more likely than the latter, the latter cannot be logically excluded at least as a possibility. Therefore, even though the Metacoordination view does not assume or entail legitimacy as an essentially contested concept, the two are definitely compatible. Finally, there is another point of contact between them: just like the Metacoordination view is sensitive to facts, i.e. it provides 'guidance for developing criteria of legitimacy in the light of the facts about particular institutions and their functions,'[254] as explained in the last part of Chapter 3 of this discussion, the standard of legitimacy may sometimes depend on facts and is not fixed/determined in advance. In particular, I had presented the example of the UK referendum, claiming that it can be regarded as illegitimate because of a conception of legitimacy consisting not on a determined/fixed factor, such as democratic procedures being followed, voters being free in law and in fact to express their will, etc., but based on a fact of the specific instance, namely the fact that the referendum consisted of a binary question, of which only one answer was known to the voters (remain in the EU). This fact gives rise to conception of legitimacy of the referendum in this instance.

[252] Allen Buchanan, *The Heart of Human Rights* (OUP 2013), Published to Oxford Scholarship Online: January 2014 http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199325382.001.0001/acprof-9780199325382-chapter-5 192.
[253] Ibid, 193.
[254] Ibid.

Note that this is accommodated by seeing legitimacy in the trichotomy as explained in the beginning. Since legitimacy is, at its most abstract form (Tier 1), a vague standard of appropriateness, by claiming that an object of legitimacy (here referendum) is legitimate or illegitimate, we are claiming a specification of that appropriateness or inappropriateness. If one sees legitimacy in this trichotomy, legitimacy is always understood as specification of appropriateness and this allows for sensitivity to the facts. The referendum is 'inappropriate' if voters are not aware of both answers to the binary question. By contrast, if one understands legitimacy outside the trichotomy, i.e. if one ignores legitimacy as a concept at its most abstract form, then one is assuming, consciously or not, some conception of legitimacy, ignoring the fact that legitimacy is a specification of appropriateness and more easily falls in the trap of assuming that the conception of legitimacy is determined by fixed criteria/conditions. This may sometimes be the case, depending on the object of legitimacy, but it is not *necessarily* the case.

4.4. *The Thin Justice of International Law* and the Twin-Pillar System

Before I end this chapter, I will briefly discuss Steven Ratner's conception of legitimacy as presented in his book *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations*.[255] In short, Ratner's conception is justice, which comprises of peace and human rights. Indeed, the book analyses the international legal order from its contribution to global justice. It argues that although the core norms of international law came about as a result of political compromises, power politics, and historical contingencies, they "conform in major respects to a standard of global justice deserving of the name."[256] He sees global justice as a process or outcome that assigns rights and duties to global actors so that it is clear what each such actor is entitled or required to do or have. If international legal norms assign those rights and duties in a way that meets a substantive standard of justice, then they are just, or else they are unjust. Ratner calls this standard 'thin' justice, under which he assesses justice of international law norms in terms of two principles or 'pillars,' namely their advancement of international and

[255] Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015) Published to Oxford Scholarship Online: August 2015 http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198704041.001.0001/acprof-9780198704041

[256] Ibid, 2.

intrastate peace and their respect for basic human rights. To pass the test, an international legal norm must satisfy both conditions. They are both necessary and sufficient conditions of justice. In other words, international legal rules are just if and only if they advance international and intrastate peace and also respect, in the sense of not interfering with, basic human rights.[257] This is Ratner's conception of justice.

The writer makes two more claims. He accepts that in some important areas, those core norms do not, or might not, meet that standard because they do not reflect the right considerations under those two pillars, so those norms are, at least if interpreted in a certain way by decisionmakers, currently unjust.[258] Indeed, although he finds most fundamental legal norms fully just, he does not regard international trade and investment law fully just, partly because law in these areas is not developed enough yet so as to be measurable toward this standard[259]. Also, Ratner finds the ban of humanitarian intervention without UNSC authorization unjust. Finally, like Buchanan, he concludes with proposals for reforms, which must consider his account of justice in the norms at present, and more broadly the ethical ramifications of choices for new norms.[260]

Given the discussion so far, it is easy to see how Ratner's legitimacy, of international law is an essentially contested concept: justice. Think how many well argued conceptions of 'justice' one could present, without an independent argument solving the dispute between them. As we have seen, justice is understood only as human rights and, in some cases, opposing peace (see 'Peace or Justice?' above when discussing Buchanan's justice as human rights view), as the latter includes unjust status quo, assuming it means merely absence of war. Furthermore, what is the argument solving the dispute about whether human rights as part of justice consists of not interfering with human rights (Ratner), or a 'thick' standard of protecting human rights, as per Buchanan? (How 'thin' or 'think' must the conception of justice be?) Absence of such an argument renders justice, and with that legitimacy, an essentially contested concept. Also, as we shall soon see, there could be conceptions of justice which do not pertain to human rights, given that the object of legitimacy here is international law.

[257] Ibid, 84.
[258] Ibid.
[259] Ibid, 315-380.
[260] Ibid, 2.

How did Ratner commit to this conception of justice and what consequences does this have? Ratner finds his conception of justice from the law itself, just where he also finds peace (not only more intuitive, but also in the UN Charter). The obvious reflection anyone would have towards a theory that finds a standard from within law itself and then applies it back to the law is circularity. The theory "develops and applies a standard of justice in a way that takes account of core realities of international politics and the global system."[261] Indeed, Ratner 'presents the standard of justice not as a fruit of his own intellectual enterprise but rather as something discovered within the legal material itself and then applies this standard to the legal material.[262]

Such arguments are susceptible to two criticisms, as Kletzer rightly continues. First, "even if we accept that there is some standard inherent in the law, why should we label this standard one of *justice*, and not, say, one of effectiveness."[263] Indeed, how much justice is needed to satisfy the justice standard of this conception of legitimacy? As Kelsen correctly observed, the principle 'ex injuria jus non oritur' ('a right cannot originate from an illegal act') does not apply in international law.[264] Therefore, a state invading, occupying and incorporating another state in its own territory – usurpation – is illegal but time can legalize this illegality by legalizing its results as the invading state has incorporated that territory in its effective and thus valid legal order. European states, having satisfied the four conditions of the Montevideo Convention, have been created after series of such illegalities. What resulted from such illegal acts is a number of (legal) states. Suppose that the invading state was not liberating occupied areas, but simply taking foreign land. This is, apart from illegal, also unjust, yet the passing of time legalizes the result of it as it establishes a legal order. Since in international law injustice creates law, international law is, to that extent, unjust. Note that law arising from injustice is not an international legal norm amenable to change. It is intrinsic to the very nature of international law; it is a truism inherent in international law. So how much justice must international law 'have' (e.g. by protecting human rights) in order to be rendered as just? How must injustice (e.g. lands unjustly taken by invading states) in

[261] Ibid, 4.
[262] Christoph Kletzer, 'Book Review of Steven R. Ratner, The Thin Justice of International Law: A Moral Reckoning of the Law of Nations' (2017) 36 Law and Philosophy 101.
[263] Ibid.
[264] Hans Kelsen, *The Principles of International Law* (Rinehart & Company 1952) 216.

international law must be accepted before it is labelled 'unjust'? What is the threshold in each answer? Which conception of justice overrides the other? All these questions invite equally well argued answers/conceptions and in the absence of an independent argument to resolve the dispute between them, legitimacy of international law is rendered an essentially contested concept. One could further wonder, and that is the second criticism, whether the standard of justice 'is a *good* standard, i.e. whether it is a standard of justice well understood and not one of justice misunderstood, whether it is a standard of true justice and not merely one of positive justice.[265]

Ratner claims to avoid circularity but he is not successful. "We can, without being circular, find justice in international law by applying a philosophical conception to legal norms, but also see the corpus of international law as saying something about what is just in the first place."[266] Kletzer rightly identifies the crucial word being 'also' and makes a correct observation.[267] There are two tasks here. The one starts from a philosophic conception of justice and then applied to international law, whereas the other starts from international law and then applied to philosophy, telling us what is just in the first place. These two tasks avoid forming a circle only if disconnected. However, this disconnect is possible, Kletzer continues, "only if the 'justice' in the first task is a different justice than the 'justice' in the second task. We thus cannot avoid circularity or, put differently, we can only avoid circularity if we accept a hidden equivocation of the central term 'justice', which seems worse than, or at least as bad as, circularity."[268] Indeed, since Ratner evaluates the law with a standard inherent in the law, the argument is bound to be circular.

As we have seen, apart from being circular, Ratner's conception of justice also renders legitimacy of international law an essentially contested concept. In the end, there is no answer to the question of how 'thin' or 'thick the standard of justice ought to be. This is a consequence of justice being an essentially contested concept: the content of the concept does not determine the level of 'thickness' or 'thinness' because this is exactly what different conceptions do. Ratner choose the level of 'thinness/thickness' already existing in (most of) international law. Hence the circularity. One could only wonder

[265] Kletzer, (n 262), 101.
[266] Ratner, (n 255), 6.
[267] Kletzer, (n 262), 101.
[268] Ibid.

how meaningful and/or useful a conception of legitimacy is when the level/threshold of justice chosen is the one inherent in the law at its current state, thus predetermining the outcome. In any case, there can be several well argued conceptions of different level of 'thinness/thickness' of justice, both in terms of human rights and also with different kinds of conceptions (it could be argued that international law with no central enforcement mechanisms to prevent and/or punish wars of aggression is unjust because of law arising from injustice) and with no independent argument solving the dispute between competing conceptions, legitimacy of international law is an essentially contested concept. Indeed, the analysis seems to suggest that in order for legitimacy to be a meaningful and helpful concept for moral reflection and deliberation, it ought to pose value or interest, thus avoiding essential contestability. Before any further general reflections on legitimacy arising from the analysis of this discussion, let's sum up what has been discussed in this chapter.

4.5. Conclusion

Having illustrated in the previous chapter how legitimacy can be an essentially contested concept, in this chapter, I have explained how it is that, given the advanced conceptions, the concept of legitimacy of international law is an essentially contested concept. I chose to discuss Buchanan's conception of legitimacy, i.e. justice in the sense of protecting basic human rights, because, as the analysis has shown, discussion on justice in the sense of human rights helps us see legitimacy as an essentially contested concept.

The analysis of Buchanan's standard of legitimacy, justice in the sense of protecting human rights, heavily relied on two interrelated distinctions, namely the distinction between rights and the interests the rights protect on the one hand, and on the other hand the distinction between rights-principles and rights in their true sense, i.e. claim rights. The distinction between rights and interests relates to the contrast between the human rights rhetoric and the interests that human rights protect. It is not the case that recognizing rights necessarily better serves the interests the rights deem to protect (though it may often be so, especially in the past). Other factors, such as technology, may have served certain interests more than recognition of certain rights. Recognition of more rights may entail restriction of already existing rights. It could be the case that

specifying obligations protects interests better. The human rights narrative/rhetoric typically pertains to human rights principles. Most human rights stipulated in the ICCPR and ICESCR are rights principles, which explains why they include several rights and liberties. Courts, through interpretation, do exactly this: they decide which rights and liberties are included in each right-principle, thus expanding or restricting the scope of each right-principle. This distinction is extremely important in terms of rendering legitimacy an essentially contested concept, as we shall soon see again.

Two ways with which legitimacy can be an essentially contested concept is by essential contestability lying within the conception of legitimacy (here justice in the sense of human rights, which is itself an essentially contested concept) on the one hand, and between different conceptions of legitimacy on the other.

With Buchanan's conception of legitimacy, we first explored the former. Justice, the standard of legitimacy as per Buchanan, is itself an essentially contested concept. One conception of justice is protecting individual human rights, whereas the other is Aristotle's 'giving each what is due', in a higher level of abstraction. The discussion has shown how it is that justice in the sense of protecting human rights is not rendered as an essentially contested concept by individual and distributive rights as competing conceptions, because they are not different conceptions of the same concept, justice, but they refer to different concepts; individual rights refer to justice between individuals whereas distributive rights to distributions. The only way for these two concepts to serve as categories of justice is to elevate justice higher in the level of abstraction and understand justice in the Aristotelian sense mentioned above, namely 'giving each what is due.' Thus, justice in the sense of basic human rights (rectificatory justice) applies to relationships between individuals, whereas justice in the sense of distributions applies to relationships between individuals and the state. 'Giving each what is due' and justice as protecting human rights, two conceptions of justice which lie at different levels of abstraction, is a way with which justice has been shown to be an essentially contested concept in this conversation.

We did see later, however, how then latter conception of justice, namely justice in the sense of protecting human rights, is itself an essentially contested concept. Due to their high level of abstraction and lack of specificity, human rights in the sense of rights-

principles are unclear as to which specific (claim) rights with their correlative obligations, and which liberties they include under their scope (importance of this distinction mentioned above). This allows for courts to expand or reduce the scope of opposing rights principles, making a political choice as to which right to stress or value more. Stress on different opposing rights, e.g. freedom of religion or freedom of speech, would thus render 'justice as protecting human rights' essentially contested. There is no argument to settle whether it is better for freedom of religion to take priority over freedom of speech (thus comics of religious entities are impermissible) or if freedom of speech should take priority over freedom of religion (thus comics of religious entities are permitted).

Towards the end of the chapter, we discussed a third conception of justice, namely Ratner's twin-pillar standard/conception of justice, comprising of advancing peace and not violating human rights. In the absence of an independent argument solving the dispute between such competing conceptions – justice in the sense of 'giving each what is due', justice in the sense of protecting human rights (Buchanan), and justice in the sense of advancing peace and not violating human rights (Ratner) - justice is an essentially contested concept, and consequently so is legitimacy, of which justice is its standard/conception.

Aside from the essential contestability within the advanced conception of legitimacy, i.e. within the concept of justice which is, in the aforementioned theories, the standard of legitimacy, legitimacy is rendered an essentially contested concept also from outside of the conception of legitimacy, i.e. essential contestability external to justice, between competing conceptions of legitimacy. For example, while one conception of legitimacy of international law may pertain to human rights, another conception could plausibly be peace/stability. One could make a case for uti possidetis or pacta sunt servanda. The analysis suggests that a single value, such as peace/stability, or an interest, may be more appropriate as standards of legitimacy because they are not essentially contested as the concept of justice and the standard consisting of one component avoids internal tensions within the standard and consequently legitimacy.

Unless legitimacy of international legal institutions (Buchanan by 'international law' refers to institutions – see 4.2.1.), procures meaning by such a standard/conception,

international law can be as legitimate for what it does as illegitimate for what it permits. If it is legitimate because it does 'the best it can', legitimacy depends on the definition of 'can'. If by 'can' we mean what could be done with the means available, then international law is illegitimate because states, through the UN, could have created an independent body responsible for authorizing military interventions to prevent states and international organizations from doing so on their own accord without authorization. But states and the UN have not created such a body, thus allowing for injustices. By the same token, international law is illegitimate to the extent that the UN does not have the legal competence or the military capability to use military force to prevent illegal attacks and invasions, or force such armies to leave invaded territory after they have attacked or invaded. It is entirely possible for states and the UN to have so, in the sense that it is humanly possible. Illegitimacy of the international legal institutions consists on the fact that they can do so but they have not done so, allowing for injustices to take place. If by 'can' we mean what is *realistically* possible, then international law is probably legitimate, considering that it is nearly impossible for the UN to establish such a solution to prevent injustices, given the opposing political interests among states and inability of the UN to both (physically) oblige and (legally) obligate to do so. In the absence of an independent argument solving the dispute between such different conceptions, legitimacy of international law is rendered again an essentially contested concept. More general reflections on legitimacy belong, however, to the final chapter.

Chapter 5
Conclusion

5.1. Summary of the Discussion

The aim of this discussion was not to construct a conception of legitimacy, but, and this is the original contribution to knowledge, to perform a conceptual analysis of legitimacy, i.e. analyse the concept of legitimacy per se detached from its conceptions, explain how it is that legitimacy can properly only be conceptualised in a trichotomy and argue that legitimacy is an essentially contested concept.

It is important to understand the conclusion of the argument. The claim does not imply that legitimacy is always essentially contested. There are obviously instances of legitimacy, both relevant and irrelevant to law, where legitimacy is not an essentially contested concept. An example of the latter is 'legitimate daughter,' where legitimacy has only one conception, so only one meaning. An example where legitimacy in the context of law is not an essentially contested concept is 'legitimate self-defence.' Given the nature of the objects of legitimacy in these two instances, there is only one conception of legitimacy for each object. What the claim that legitimacy is an essentially contested concept means is that it is in the nature of the concept to lend itself to one or more conceptions, so there are bound to be (some) instances where not only one, but several conceptions are equally well argued and evidenced, and in the absence of an independent argument solving the dispute between competing concepts, legitimacy is an essentially contested concept, because it is not the case that one of the conceptions is correct and the others are wrong. In which cases legitimacy is an essentially contested concept depends on the object the concept is attached on and/or facts. Because legitimacy is an open-ended concept, i.e. it does not have a specified content/meaning other than a vague notion of properness, it lends itself to conceptions which procure meaning to the concept by specifying the notion of properness.

The vague notion of properness on the one hand and the substantive conceptions on the other which procure content to the concept entail that trichotomy (we can imagine a pyramid) is the only way to properly understand legitimacy. At the very top of the

pyramid (Tier 1), legitimacy at its most abstract form is nothing but a vague notion of properness, at the next tier below (Tier 2), legitimacy is matched with objects and at the final tier, Tier 3, conceptions fully specify the concept by stating the necessary and sufficient conditions for the concept to obtain. If in Tier 2 legitimacy is matched with an object which renders the concept of legitimacy fully specified and not contested because there is only one correct conception, then Tier 3 will consist of that conception. If the object legitimacy is matched with renders legitimacy essentially contested, then Tier 2 will include the object, and Tier 3 will consist of all the equally well agued and evidenced conceptions. This conceptual framework helps us correctly understand legitimacy.

Conceptual analysis of legitimacy in its legally relevant form, i.e. legitimacy when matched with objects which belong in any of the four object types of legal form (individual laws, actions, actors, legal systems) yielded interesting results. First, we made it abundantly clear that this discussion pertains exclusively to normative, not descriptive (or sociological or perceived) legitimacy, that these are two different concepts and that there is no logical connection between them. As a matter of conceptual analysis, none of the two is a necessary or sufficient condition of the other. Any logical connection between the two would have to be established by a particular conception of legitimacy (Tier 3), specifying the necessary and sufficient conditions for legitimacy to obtain. Second, we concluded that in order to discuss normative legitimacy, nihilism, the view that there are no objective moral facts, has to be refuted. We did not attempt to disprove the negative thesis of nihilism. For the purposes of the argument in this discussion, it sufficed to conclude that none of the three nihilist theories mentioned (error theory, individual and cultural relativism) can be held consistently with normative legitimacy, because either there are, or there are no objective moral facts. Normative legitimacy, implying at least some objective morality, entails that it is at least partly substantive and not entirely procedural. We explained how it is that although as a matter of conceptual analysis an entirely procedural conception of legitimacy is (conceptually) possible, it would be highly problematic as it would commit itself to substantively inappropriate results stemming from obedience to procedure alone, and an argument for such a conception may not even be able to get off the ground, since absence of substance and reliance on procedure would lapse legitimacy into legal validity. Then, the views of legitimacy as claim right and liberty

right were presented and rejected, and then the thesis explained, as per Applbaum, how it is that legitimacy is a moral power.

In the next step of the analysis, we discussed the relation of legitimacy with neighbouring concepts on the one hand, and with conceptions on the other. We proved how it is that, assuming legal positivism, the so called 'legal legitimacy' is a non-concept, as it lapses into legal validity, whereas natural law cannot make a case for such a concept either. Then, we analysed the neighbouring concept of legitimacy, namely authority and explained the relationship between the two concepts. The thesis proceeded to essentially contested concepts, as per Gallie, and then briefly explored how the concept vs conception distinction was entertained by Hart, Rawls and Dworkin. We then illustrated how it is that legitimacy is an essentially contested concept, which is the thesis, the main claim of the argument, and the main contribution of this discussion to knowledge. What the normative standard of legitimacy is depends on the object of legitimacy and the context, the circumstances. We explained how it is that in many instances, the vague standard of properness, which is the minimal content of legitimacy, is specified not by a priori fixed criteria, but in the light of circumstances which may give rise to different conceptions of legitimacy. Also, we referred to instances of legitimacy where the conception itself is essentially contested, such as the conception of democracy in political legitimacy. With the only permanent content of the concept of legitimacy, i.e. content of the concept detached from any normative conceptions, being a vague standard of properness, the concept of legitimacy is inevitably open ended, content-neutral and lends itself to different standards/conceptions which specify that standard of properness. Without an argument to solve the dispute between equally reasonable and well-argued competing conceptions, legitimacy is an essentially contested concept.

Having completed the conceptual analysis in Tiers 1 and 2, we proceeded to Tier 3, the level of conceptions. The conception of legitimacy we analysed is legitimacy of international law in the sense of justice as protecting basic human rights, because it is a prevalent conception and mostly because this conception helps us see legitimacy as essentially contested in at least two ways. First, essential contestability lies within the conception of legitimacy (here, justice) on the one hand, and between different conceptions of legitimacy of international law on the other. As regards the first, justice,

and consequently legitimacy, is an essentially contested concept with one conception being protection of individual rights and the other conception being Aristotle's 'giving each what is due', at a higher level of abstraction. The second way with which legitimacy of international law is an essentially contested concept is by there being equally well argued conceptions with no independent argument to solve the dispute between them. Here the essential contestability lies outside justice, i.e. outside the conception of legitimacy. Conceptions of legitimacy of international law which render the concept essentially contested is justice in the sense of protecting basic human rights, Ratner's twin pillar standard of advancing peace and respecting, in the sense of not violating, human rights, stability, etc.

5.2. Reflections

What is the difference, if any, between the standards including human rights on the one hand and stability on the other? Apart from justice itself being an essentially contested concept (individual rights vs Aristotle's 'giving each what is due'), human rights, we concluded, is also an essentially contested concept. This is due to the combination of their plurality (many rights) with their high level of abstraction. As explained in the last chapter, many human rights stipulated in international instruments are not claim rights, but human rights principles which include several claim rights and liberty rights. They are stipulated high in the ladder of abstraction, which renders their specification, i.e. identification of rights (and thus correlative obligations) and liberties that fall under their scope, quite challenging. The combination of their level of abstraction with the plurality of rights establishes the possibility of several conceptions of human rights standards to be established, depending on which human rights (pluralism) and up to which extent of these rights (abstraction) priority will be given over the rest.

It so seems that justice and legitimacy are essentially contested concepts because they belong to the same category of concepts. Both justice and legitimacy do not refer to a thing, but to a property of things.[269] This is why it is more intuitive to focus the explication on the adjective 'just' or 'unjust', 'legitimate', 'illegitimate.' This use facilitates clarification of how justice and legitimacy judgments are distinctive within the larger realm of moral judgments, and the even larger of evaluative judgments. The

[269] This paragraph is adaptation from Justice https://www.encyclopedia.com/social-sciences-and-law/law/law/justice

application of ordinary empirical predicates such as ‘chair’ or ‘hard’, is two-tiered: it is based on a definition and on empirical facts. Thus, any dispute about whether such a predicate applies is reducible to linguistic and empirical differences. Such a dispute can be resolved by agreeing on a definition and settling the empirical disagreement. By contrast, evaluative predicates have this special feature: their application is only conditioned, not determined, by their definition and the empirical facts. It is for this reason that there can be reasonable disagreements about whether a painting is beautiful (Gallie mentions art as an example of essentially contested concept), even if the predicate is used in exactly the same sense and there is complete agreement regarding all the empirical features of the painting. In such cases, there are different conceptions of beauty and, as per Gallie, if there is no independent argument to solve the dispute between equally well-argued conceptions, the concept is essentially contested. The same holds for moral predicates. Despite agreement on all relevant empirical facts, there are reasonable and equally well-argued disagreements about whether something is praiseworthy or not, just or not, legitimate or not. Such disagreements could stem from failure to understand the meaning of the word (though such disagreements would not be referring to essentially contested concepts per se as different concepts would be deployed). However, more typically, the meaning of the word is known and the disagreement shows that the empirical facts and the meaning of the word together do not determine its correct application. Those who judge it praiseworthy to teach children by beating them are morally mistaken. They do not need linguistic instruction to improve their understanding of ‘praiseworthy’. They are well aware of both the word and the concept. They need a good discussion about how children should be educated. A dispute over the application of evaluative predicates such as ‘just’ and ‘legitimate’ may thus be due to differences of three kinds: *empirical* differences about the evaluated object, *linguistic* differences about the meaning, and *theoretical* differences about which substantive conception of the concept (justice, legitimacy) should guide its application.

Indeed, it seems that in order for legitimacy to be a meaningful and helpful concept for moral reflection and deliberation, it ought to pose a value, such as *a* moral value, or *an* interest, such as one of the interests protected by human rights. This avoids essential contestability of the concept of legitimacy and allows it to function as a true standard law can be measured and evaluated by. One could say, for example, that peace/stability is the standard of legitimacy of international law.

Peace/stability is neither a moral right nor obligation, but a moral value.[270] It is a value we have good reasons to pursue because it is necessary for our survival, since without peace/stability in human interaction, chaos will ensue and human beings cannot flourish. Indeed, peace/stability is not just one of the goals of international law, but just like in all legal orders, the primary reason of its existence. One does not need to refer to Hobbes or Hart to understand that as a matter of fact, with the knowledge of human civilization as we know it and certain truisms about human nature, the primary need for law is to maintain social order so members of the society can (peacefully) coexist. Coexistence necessarily implies peace/stability because members of the society constantly using force against each other is a state of chaos/anarchy, not one of order/coexistence. A legal order necessarily implies social order, which in turn necessarily implies restraining the use of force and preservation of peace/stability. As Kletzer pointed out, all law is essentially primitive law.[271] Despite the huge amount of legislation in contemporary legal orders and the many functions that law has in the society, such as helping us delineate our moral intuitions, in the roots of every legal order (both domestic legal orders and the international legal order) lies one fundamental element: restraining the use of force. It is not an accident that historically states have been understood as the only subjects entitled to use force and that philosophy of law and political philosophy have for very long time been discussing political legitimacy which has historically meant justification of coercion by the state. The question of what justifies the government to use coercion and restrict freedom of individuals is premised on the need for peaceful/stable mutual coexistence of members in a society/legal order. Whether we like it or not, the subjects of international law are still states and international organizations with states still being far more important actors in the international legal and political realm. Therefore, despite the importance of human rights as a goal of international law, peace/stability as a standard of legitimacy is inherent to law and the primary reason for the existence of law, which is why it has always made sense for it to be the standard of legitimacy. Peace/stability is inherent to very nature, main function and primary need of law, all law, thus both international and domestic.

[270] This refers to the distinction between ethics or moral philosophy, i.e. what is right and wrong, on the one hand, and value theory, i.e. what is valuable and good, on the other.
[271] Christoph Kletzer, 'Primitive Law' (2013) 4 Jurisprudence 262.

One need not be concerned, based on Buchanan's argument which I very strongly agree with, that sometimes it is morally obligatory to violate peace for justice. First, as mentioned above, peace/stability is a value, not an obligation. Thus, there are good reasons to pursue it and a legal order achieving it counts for it being legitimate. Second, as argued in Chapter 2, legitimacy being a moral power entails that normative relationships may change, not that there is always moral obligation to obey. Thus, the moral right to violate peace/stability on the grounds of justice (either justice in terms of human rights or justice in terms of reclaiming unjustly taken territory) is accommodated. Legitimacy as peace/stability would not mean that human rights are not or ought not to be an important goal of international law. What it means is that legitimacy may best be understood without the essentially contested concept of justice, but with the value that international law, like all law, is destined, as a legal order, to maintain. Human rights can only be protected when there is a legal order in place. It is that legal order that peace/stability maintain. Therefore, peace/stability is not an antagonist of human rights or any other goals a legal order may set, but a presupposition.

Two important points must be made for peace/stability as a standard of legitimacy. First, it applies particularly for the object of legal orders/systems. It does not apply for actors, actors or legal norms, or at least not necessarily so; it will depend on the nature and role of the given actor, action or norm. The argument I presented here is intended to apply only to peace/stability as a standard of legitimacy of a legal order, international or domestic. Second, perhaps just as obvious, peace/stability is a necessary but not sufficient condition of legitimacy of a legal order. The 18th century US legal order did maintain stability but it is illegitimate because it deprived of slaves their liberty (ground of objective morality).

There is no doubt that in order for a conception of legitimacy to be meaningful and useful in our deliberation and moral evaluation of the law, a well argued conception of legitimacy of a legal order must include, apart from peace/stability, some substantive morality. The latter does not have to be the problematic standard of human rights. Objective morality as a necessary condition of legitimacy of legal orders may take the form of a set of specific prohibitions/moral obligations, such as prohibition of genocide,

prohibition of torture, prohibition of aggressive war, etc. Having argued for two conditions of legitimacy of a legal order stemming from reflections on this discussion, I will leave this issue to rest, as constructing a new normative conception of legitimacy of legal orders is outside the scope of this discussion.

Buchanan's conception of legitimacy of protecting basic human rights sets the individual at the forefront of international law, but it could perhaps be the case that some implications of this move have not been sufficiently explored. Law as a phenomenon serves humanity, individuals, by establishing social order. In terms of law as a legal order, domestic legal orders have historically been established mainly to protect individuals from external attacks. The traditional 'agreement' between individuals and states is that the former pay tax and the latter provide protection from external, but also from internal, threats. Law is thus correctly seen as serving the individual. Therefore, it is expected that, in an era where in the international realm non state actors obtain increasingly more capacity, the idea of international law serving the individual (contrast to the subjects of public international law: states and international organisations) and the idea of the individual being at the forefront of protection of international law would start to play a role and seem particularly attractive. Indeed, the charm of justice as conception of legitimacy in international law is that it makes the individual centre of international law.

However, states remain the main actors of international law and more importantly, it is the states which assume obligations to protect interests of the individuals. Rights have meaning because of their correlative obligations. In the case of human rights, the obligations correlative to human rights, are mostly on states. It is the states that ought to have an efficient criminal and justice system in order to protect the right to life and right to not be tortured, it is the states that have to negatively and positively protect the freedom of expression and religion, it is the states that ought to satisfy the obligations entailed by the social rights, etc. Therefore, it could perhaps be argued that although from a humanitarian standpoint what is more important is who has the right, it could be the case that legally speaking, what is more important is who has the (correlative) obligation.

Besides, there could be more obligations than rights. Since rights, contrast to liberties, consist on correlative obligations, obligations are what give meaning to rights and there cannot be more rights than obligations. There could be, however, more obligations than rights. Consider this simple example. A friend asks me to let him stay with me because he is in some need. I have moral duty to let him stay but he has no moral claim right. This is why if he feels entitled to me letting him stay, I am justified in being less inclined to let him in. Perhaps this thought can be helpful in the context of distributive rights. If there are more obligations than rights and obligations give meaning to rights, perhaps it is best to specify what exactly the obligations of states are in terms of distributions, and inferring from these obligations the correlative rights, rather than the other way around.

Finally, the observation that we must save human rights from human rights law is in agreement with the most recent work in human rights. Discussion on Buchanan was premised on a sharp distinction between human rights as principles on the one hand and as (claim) rights on the other. The latter imply obligations, which give rights their normative content. The discussion is thus in agreement with Tasioulas' claim that we must save human rights from human rights law partly because the latter overlooks the distinction between universal moral interests and universal moral rights.[272] In order for international human rights law to achieve its primary goal, which is to give effect to universal moral rights (not generally human interests), human rights law must clarify obligations implied by human rights.[273] A manifestation of the failure of international human rights law to be regulated by a background morality of human rights "is the widespread anxiety about human rights inflation,"[274] an issue which has also been raised in the analysis of Buchanan's theory.

With the conceptual framework of legitimacy as an essentially contested concept and the above reflections in mind, a further fruitful exploration would be whether well argued conceptions of legitimacy would consist of obligations rather than rights. Indeed, stability, in terms of composing a normative conception of legitimacy, could be

[272] John Tasioulas, 'Saving Human Rights from Human Rights Law' (forthcoming, February 2019 draft on file with author), 14 and more generally 12-2 under 'Confusing Human Rights with Interests and Values.'
[273] Ibid, 12 and 14.
[274] Ibid, 14.

supplemented by rights or obligations. Since, relieved from flaws of international human rights law as mentioned above, human rights can function not as principles but as (claim) rights whose normative content is determined by obligations, a full overlap between rights and their correlative obligations would imply that the same content can be stipulated by rights or obligations narrative. If the narrative is chosen based on what is appropriate in context/circumstances, the correct conception could be reached in context, without unnecessary disagreements between conceptions which are equally well argued, a conclusion reached only by assuming the framework of this discussion.

Bibliography

Books and Book Chapters

Alexy R, *A Theory of Constitutional Rights* (OUP 2010)

Applbaum A I, *Legitimacy: The Right to Govern in a Wanton World* (forthcoming, March 2018 draft on file with author)

Aristotle, *Politics* (Benjamin Jowett translation, Clarendon 1985) Book III, Chapter VII

Austin J, *The Province of Jurisprudence Determined* (first published 1832, Wilfrid E Rumble ed, CUP 1995) lecture V

Bendix R, *Kings or People: Power and the Mandate to Rule* (University of California Press 1978)

Bendix R, *Max Weber: An Intellectual Portrait* (University of California Press 1977)

Bodansky D, 'Legitimacy in International Law and International Relations' in Dunoff J L and Pollack M A (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2013)

Brownlie I, *Principles of Public International Law* (6th edn, OUP 2003)

Buchanan A, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2003)

Buchanan A, *The Heart of Human Rights* (OUP 2013)

Buchanan A, 'The Legitimacy of International Law,' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010)

Cassese A, *International Law* (2nd edn, OUP 2005)

Coleman K P, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (CUP 2007)

Donnelly J, 'Ethics and International Human Rights,' in Jean-Marc Coicaud and Daniel Warner (eds), *Ethics and International Affairs, Extent and Limits*, (United Nations University Press 2001)

Franck T M, 'Legitimacy and Fairness' in Fairness in International Law and Institutions (OUP 2011)

Franck T M, *The Power of Legitimacy Among Nations* (OYP 1990)

Finnis J, *Natural Law and Natural Rights* (OUP 1980)

Fuller L L, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630

Hart H L A, *The Concept of Law* (2nd edn, OUP 1994)

Hayek F A (author), Nishiyama C and Leube K R (eds), 'Social or Distributive Justice' in *The Essence of Hayek* (Hoover Institution Press 1984)

Honoré A M, 'Social Justice' in *Essays in Legal Philosophy* (Robert S. Summers ed, University of California Press 1968)

Hurd I, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007)

Jones C, *Global Justice: Defending Cosmopolitanism* (OUP 1999)

Kelsen H, *General Theory of Law and State* (Anders Wedberg translation, Lawbook Exchange 2007)

Kelsen H, *The Principles of International Law* (Rinehart & Company 1952)

Kramer M, Simmonds N E and Steiner H, *A Debate Over Rights: Philosophical Enquiries* (Oxford Scholarship Online 2010)

Mises L, *Human Action* (Yale University Press 1949)

Plato, *The Republic and Other Words* (Benjamin Jowett translation, Anchor 1980)

Rawls J, *A Theory of Justice* (Harvard University Press 1971)

Ratner R R, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015)

Raz J, 'Legitimate Authority' in The Authority of Law: Essays on Law and Morality (OUP 1979)

Raz J, *Practical Reason and Norms* (OUP 1975)

Rothbard M R, 'Towards a Reconstruction of Utility and Welfare Economics' in Mary Sennholz (ed.), *On Freedom and Free Enterprise* (New York, 1965)

Runciman W G, *Relative Deprivation and Social Justice* (Routledge & Kegan Paul 1966)

Skinner Q, *The Foundations of Modern Political Thought Vol. II* (CUP 1978)

Steiner K, *Strategies for International Legitimacy, A Comparative Study of the Elite Behaviour in Ethnic Conflicts* (Lund University Press 1996)

Simmonds N E, *Central Issues in Jurisprudence* (5th edn, Sweet & Maxwell 2018)

Tasioulas J, 'The Legitimacy of International Law,' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010)

Zelditch M Jr, 'Theories of Legitimacy' in John T Jost and Brenda Major (eds), *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (CUP 2001)

Academic Articles

Applbaum A I, 'Legitimacy without the Duty to Obey' (2010) 38 Philosophy & Public Affairs 215

Brownlie I and Apperley C J, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 29 ICLQ 878

Elsig M, 'The World Trade' Organization's Legitimacy Crisis: What Does the Beast look Like?' (2007) 41 Journal of World Trade 75

Franck T M, 'Legitimacy in the International System' (1988) 82 The American Journal of International Law 705

Gallie B W, 'Essentially Contested Concepts' (1956) 56 Proceedings of the Aristotelian Society 167

Gardner J, 'Legal Positivism: 5 ½ Myths' (2001) 46 American Journal of Jurisprudence 199

Greenwood C, 'International Law and the NATO Intervention in Kosovo' (2000) 49 ICLQ 926

Hayden R, 'Humanitarian Hypocrisy' (1999) 8 East European Constitutional Review 91

Hurd I, 'Legitimacy and Authority in International Politics' (1999) 53 International Organization 379

Kletzer C, 'Primitive Law' (2013) 4 Jurisprudence 262

Kletzer C, 'The Normative Jinx' (2017) 37 Oxford Journal of Legal Studies 798

Koskenniemi M, 'Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism,' 7 Associations: Journal for Legal and Social Theory (2003) 349

Kumm M, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 5 European Journal of International Law 907

Ladenson R, 'In Defense of a Hobbesian Conception of Law' (1980) 9 Philosophy & Public Affairs 134

Phelps M L, 'Doppelgangers of the State: Private Security and Transferable Legitimacy' (2014) 42 Politics & Policy 824

Rapkin D P and Braaten D, 'Conceptualising Hegemonic Legitimacy' (2009) 35 Review of International Studies 113

Raz J, 'Authority and Justification' (1985) 14 Philosophy & Public Affairs 3

Raz J, 'Kelsen's Theory of the Basic Norm' (1974) 19 American Journal of Jurisprudence 94

Raz J, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003

Rich R, 'Bringing Democracy into International Law' (2001) 12 Journal of Democracy 20

Rosenfeld M, 'Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory' (1985) 70 Iowa Law Review 769

Simmons A J, 'Justification and Legitimacy' (1999) 109 Ethics 739

Talmon S, 'The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?' (2004) 75 British Yearbook of International Law 101

Tasioulas J, 'Saving Human Rights from Human Rights Law' (forthcoming, February 2019 draft on file with author)

Thomas A C, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 Oxford Journal of Legal Studies 729

Wellman C H, 'Liberalism, Samaritanism, and Political Legitimacy' (1996) 25 Philosophy and Public Affairs 211

Reports and Working Papers

Applbaum A I, 'Legitimacy in a Bastard Kingdom' (2004) Centre for Public Leadership Working Paper 04–05 <https://dspace.mit.edu/bitstream/handle/1721.1/55927/CPL_WP_04_05_Applbaum.pdf?sequence=1> accessed 24 March 2018

Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000)

Parliament. House of Commons Foreign Affairs Committee 4th Report (June 2000) Kosovo (2000) 49 ICLQ 876-877

Other (Press Articles, Newspapers, Book Reviews)

Chomsky N, The Current Bombings: Behind the Rhetoric (March 1999) <https://chomsky.info/199903>

Cockburn P, 'Amnesty Questions Claim That Gaddafi Ordered Rape as Weapon of War', *The Independent* (24 June 2011) https://www.independent.co.uk/news/world/africa/amnesty-questions-claim-that-gaddafi-ordered-rape-as-weapon-of-war-2302037.html

Kletzer C, 'Book Review of Steven R. Ratner, The Thin Justice of International Law: A Moral Reckoning of the Law of Nations' (2017) 36 Law and Philosophy 101

Samberg L, 'How new technology could help to strengthen global food security', World Economic Forum https://www.weforum.org/agenda/2018/03/food-security-s-social-network accessed on the 24th March 2019 at 16:20